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Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

ELLEN M. PECK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

1. Since there was no evidence in the record to show that the insured's late notice did not prejudice the insurance company and the burden of proof on that issue was on the plaintiff, did the Court of Appeals' opinion, which reversed summary judgment for the insurance company, violate the plain language of Federal Rule 56, as applied in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)?

2. Did the Court of Appeals abuse its discretion in using of an Errata Sheet to make substantive changes in the Court's opinion instead of granting the petitioner's Petition to Rehear?

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are the petitioner, Public Serv. Mutual Insurance Company, appellee and defendant in proceedings below, and the respondent, Ellen M. Peck, appellant and plaintiff below. Another party in this litigation, Insurance Company of Greater New York, was dismissed from the district court proceedings; was not a party to the proceedings in the Court of Appeals; and is not a party in this proceeding.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 23

APPENDIX

Circuit Court Reported Decision 1a

Errata 20a

Circuit Court Slip Opinion 24a

District Court Order 42a

Order Denying Rehearing 29a

Excerpts from Motion for Summary Judgment 61a

Excerpts from Defendant's Local Rule 9(c)1 Statement of Uncontested Material Facts 62a

Excerpts from Plaintiff's Memorandum in Opposition to Motion for Summary Judgment 64a

Petition for Rehearing and for Rehearing en Banc 68a

TABLE OF AUTHORITIES

Cases

AETNA CAS. & SURETY CO. V. MURPHY, 206 CONN. 409, 412, 538 A.2D 219, 220 (1988) ..... *passim*

CATRETT V. JOHNS-MANVILLE SALES CORP., 756 F.2D 181, 185 (D.C. CIR. 1985) 10

CELOTEX CORP. V. CATRETT, 477 U.S. 317 (1986) ..... *passim*

CITY OF WEST HAVEN V. UNITED STATES FIDELITY & GUAR. CO., 174 CONN. 392, 397, 389 A.2D 741 (1978) 15

PECK V. PUBLIC SERVICE MUT. INS. CO., 326 F.3D 330 (2D CIR. 2003) 1, 5, 15

Statutes

28 U.S.C. § 1254(1) 1

Other Relevant Provisions

FEDERAL RULE OF CIVIL PROCEDURE, RULE 1 22

FEDERAL RULE OF CIVIL PROCEDURE, RULE 56 ..... *passim*

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Second Circuit in this case, which made no reference to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), is unreported. After the Petitioner moved for a rehearing, pointing out the failure of the panel to consider *Celotex v. Catrett*. The panel responded by issuing an Errata Sheet, explaining that "in light of the theory on which the district court granted summary judgment ... we think Peck has [made a sufficient showing on the lack-of-prejudice issue]." (App. 20a) No evidence on the lack-of-prejudice issue was cited. The opinion, as amended by the Errata Sheet, is reported as *Peck v. Public Service Mut. Ins. Co.*, 326 F.3d 330 (2d Cir. 2003).

THIS COURT'S JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

STATUTORY AUTHORITY INVOLVED

This case involves Rule 54 of the Federal Rules of Civil Procedure, as that rule is applied under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

STATEMENT OF THE CASE

This is an insurance coverage case involving late notice to the insurer of the claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) mandates that summary judgment will be entered against a party will bear the burden of proof on a particular issue at trial if that party does not provide evidence on that issue in opposition to a summary judgment motion. Under Connecticut law, the burden of proof in an insurance coverage case

involving late notice is on the insured, not the insurer, to prove that the insurer was not prejudiced by the late notice. *Aetna Cas. & Surety Co. v. Murphy*, 206 Conn. 409, 412, 538 A.2d 219, 220 (1988).

In the District Court proceedings the plaintiff deliberately refused to produce evidence to meet her burden of showing that the late notice was not prejudicial to the insurer. Under *Celotex* such a deliberate refusal to produce evidence "mandates" the entry of summary judgment. Accordingly, the petitioner was entitled to summary judgment.

Petitioner's motion for summary judgment was granted by the District Court (App. 42a-57a), but that holding was reversed by the Court of Appeals. Because the Court of Appeals' decision contradicts the clear holding of the *Celotex* case, the insurance company now petitions this Court to grant certiorari to reiterate and reapply its ongoing policy that in summary judgment proceedings, the failure of a party who will bear the burden of proof at trial to produce any evidence on an essential issue mandates the entry of summary judgment against that party.

The Underlying Action. This claim for liability insurance proceeds arises out of a state court judgment in an excessive noise suit against a restaurant, Rattlesnake Bar & Grill ("Rattlesnake") and its landlord, South Norwalk Redevelopment Limited Partnership ("South Norwalk"), the insured involved in the present case. Both were insured by Public Service Mutual Insurance Company ("PSM" or "Public Service").[1]

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[1] The first possible notice date, September 12, 1995, was over eight months after December 1, 1994, the

Peck brought the state court suit on June 23, 1994 against both the restaurant and against South Norwalk. It is undisputed that Public Service's first notice of the underlying suit was could not have been earlier than September 12, 1995, over fourteen months after suit was filed. On that date South Norwalk's codefendant, Rattlesnake, gave Public Service notice of the suit against it and forwarded its suit papers to Public Service.

South Norwalk did not request coverage. Instead it decided to hire its own attorney and entered into its own defense. Although the two defendants were both insured by PSM (and other carriers), the denial of coverage to Rattlesnake and South Norwalk's retention of its own counsel ended PSM's active participation in the underlying case.[2]

The year following the verdicts, on April 4, 1999, Peck informed Public Service that she had taken judgment against South Norwalk, asserting that she was entitled to be paid under the South Norwalk's policy with Public Service. Thereafter, asserting that she had an assignment from South Norwalk, she brought this action to assert South Norwalk's rights under the policy.

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date on which the insurance policy on the Rattlesnake restaurant went into effect.

[2] Ultimately, the attorney chosen by South Norwalk allowed the case to go into default for failing to respond to discovery. The same jury that determined the case against Rattlesnake also rendered a verdict on the default against South Norwalk. The verdicts were taken on August 5, 1998.

The Summary Judgment Motion. After this action had been in the District Court for over two years, Public Service moved for summary judgment on a number of grounds. Among the grounds asserted was Public Service's assertion that, because notice was late, and because Connecticut law imposes the burden of proof in late notice cases on the tardy notifier to show that the insurance company was not materially prejudiced by the tardiness, the plaintiff is not entitled to recover. (App. 61a, 65a)

More specifically, Public Service asserted that, "Because the plaintiff cannot show that the delay was not prejudicial, the plaintiff cannot recover. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)." (App. 65a) In response, the plaintiff made a number of arguments: For example, she argued that, by failing to issue a disclaimer of coverage, the defendant had "waived" the late notice issue. More to the point here is her second argument: She argued that, even if the court agreed that notice was late, she would prove her case at trial.[3]

In other words, instead of responding to the summary judgment motion with specific evidence that

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[3] In dealing with the lack-of-prejudice issue, the plaintiff totally ignored the holding of *Celotex v. Catrett* that Rule 56 requires that the party with the burden of proof on an issue must produce evidence on that issue in order to avoid summary dismissal. Instead, she merely submitted a memorandum in opposition to the summary judgment motion, asserting that at trial she "should ... be permitted to offer evidence that the defendant was not prejudiced by the alleged lack of notice." Memorandum in Opposition to Motion for Summary Judgment, at App. 66a-67a.

the insurer was not prejudiced by the delay, as required by Rule 56, she attempted to meet her burden with a mere promise that proof would be forthcoming at trial. Under *Celotex v. Catrett*, such a promise is not enough. Because the plaintiff made no effort to produce evidence on this essential issue, the *Celotex v. Catrett* doctrine mandated the entry of summary judgment against the plaintiff.

The District Court granted the petitioner's motion for summary judgment on the late-notice issue. Although the District Court indicated that the first effective notice to Public Service was the post-verdict letter of April 4, 1999, it also declared that, under Connecticut law, a four-month delay in notice is late notice, citing *City of West Haven v. United States Fidelity & Guar. Co.*, 178 Conn. 392, 397, 389 A.2d 741 (1978). (App. 55a.) Because the notice was late under the terms of the insurance contract, the District Court granted summary judgment.

The Initial Opinion. On April 17, 2003, a panel of the Second Circuit issued an opinion, reversing the District Court and remanding the case for further proceedings. (App. 24a-41a.) In reaching this conclusion, the Court did not discuss or even cite *Celotex v. Catrett*. Instead, the panel focused on a different issue, whether notice from a codefendant could be notice from the insured. Ignoring the fact the notice was late under either theory and that the *Celotex*-required evidence was totally absent in the record, the panel reversed the grant of summary judgment.

The panel totally missed the *Celotex v. Catrett* issue. In doing so, it committed reversible error. On one hand, if Public Service's first notice of the underling suit was in 1999, as asserted in the District Court's theory, it

was five years late — an obvious breach of the prompt notice provision. On the other hand, even if the insurer is charged with notice as early as September 1995, it was still over one year after the suit was commenced and over eight months after the policy went into effect. Whatever theory is chosen, notice was late.

Under Connecticut law, a corollary of late notice is that the burden is on the insured, i.e., on the plaintiff, not on the insurance company, to show that the late notice did not prejudice the insurance company. *Celotex v. Catrett* held that, to avoid summary judgment, the plaintiff had to produce evidence that Public Service was not prejudiced. The plaintiff in this case introduced no evidence on the lack-of-prejudice issue. Absent such proof, this Court's holding in *Celotex* mandates that summary judgment for the defendant.

The Petition to Rehear. Because the panel failed to reach the *Celotex v. Catrett* issue, the defendant filed a petition to rehear and a petition for an en banc rehearing, was basing its entire argument on *Celotex v. Catrett.* (App. 68a-77a) Pointing to the obvious problem with the first opinion's failure to consider, or even cite, the *Celotex* case, Public Service argued that, because *Celotex v. Catrett* "mandates" that summary judgment should have been granted, the District Court's judgment should have been affirmed.

The Errata Sheet. The Court of Appeals responded by purporting to address the *Celotex v. Catrett* issue in an Errata Sheet. Unfortunately the Errata Sheet revision does not meet the *Celotex v. Catrett* criticism. Even though the new language added by the Errata Sheet includes a correct statement of the *Celotex* principle, the panel failed to apply the principle.

More specifically, the Errata Sheet revision recognized the since Peck has the burden of proof at trial on the lack-of-prejudice issue, she is required to " 'come forward with specific facts showing that there [was] a genuine issue for trial' on the issue of material prejudice."[4] Under *Celotex*, such a failure to show facts showing prejudice "mandates the entry of summary

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[4] The Errata Sheet stated that:

> Where the non-moving party bears the burden of proof on an issue, as Peck does here on the issue of material prejudice, ... to survive summary judgment, Peck must "come forward with specific facts showing that there [was] a genuine issue for trial" on the issue of material prejudice. ... [S]ee also Celotex, 477 U.S., at 323 ("The moving party is entitled to judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Neither the Errata Sheet, nor the remainder of the Second Circuit Opinion, nor anything in the record identifies any evidence that the defendant was not prejudiced. As Justice Peters stated in *Aetna v. Murphy*, such proof "may not be easy." *Aetna Cas. & Surety Co. v. Murphy*, 206 Conn. 409, 420, 538 A.2d 219 (1988).

Notwithstanding a lack of "specific facts," the Errata Sheet glossed over the problem stating: "In light of the theory on which the district court granted summary judgment in favor of Public Service, we think that Peck has done so here." (App. 20a.)

judgment" for the defendant. 477 U.S., at 322.

In other words, while the Errata Sheet recognized the plaintiff's obligation under *Celotex* to show "specific facts" to support her lack-of-prejudice argument, it failed to follow that criterion, remanding the case to ask a second time if plaintiff show facts to show prejudice "based on prejudice derived from events prior to September 1995. ..." 325 F.3d, at 339. Such proof did not exist the first time the case was tried. The Court of Appeals should not belabor this case with a further effort to prove the unprovable.

Thus, despite a correct statement of the law, the Appeals Court's opinion, even after the Errata Sheet revision, remains flawed with a persistent *Catrett v. Celotex* problem. The purported revision does not cite any evidence in the record, and there is no evidence in the record, to meet the plaintiff's burden of showing that the insurance company was not prejudiced by the delay in notice. Under *Celotex v. Catrett*, a party with the burden of proof at trial cannot resist summary judgment by simply resting with a promise of more proof at trial.

The Denial of the Rehearing Petitions. Even though the rehearing petition had pointed out a significant error in the panel's initial opinion, the Second Circuit did not grant either the petition to rehear or the petition to rehear en banc.(App. 59a.). Instead, the Errata Sheet handed down after the rehearing deadline had expired, became the final decision of the Court of Appeals.

By allowing the Errata Sheet to supercede the initial opinion after the time for filing rehearing petitions had passed and after the petitioner-appellant had filed its petitions, the Second Circuit effectively cut off the

petitioner-appellee's opportunity to point out to the Court of Appeals the facts that: (1) regardless of whether the Court adopts the theory of codefendant notice, notice to the insurer was still late, and (2) notwithstanding the panel's adoption of the codefendant notice theory, the plaintiff still had failed to satisfy her burden under Rule 56 of producing evidence that the insurer was not prejudiced by the late notice.

ARGUMENT

This petition asks for relief for several reasons. First, even after being revised via the Errata Sheet, the Second Circuit's opinion contradicts the express mandate of this Court in *Celotex*. Because this contradiction violates an important principle of federal procedure, the petitioner seeks certiorari. Moreover, because the Court of Appeals' use of an Errata Sheet to make substantive changes in an opinion deprived the petitioner of the right to seek a rehearing on the revised opinion, it should be remanded to the Court of Appeals with instructions to allow the petitioner to be heard whether that court's failure to identify "specific evidence" of lack of prejudice contravened this Court's holding in *Celotex v. Catrett*.

ONE. THE SECOND CIRCUIT'S OPINION, BOTH IN ITS INITIAL FORM AND AS ULTIMATELY AMENDED BY THE ERRATA SHEET, VIOLATED THE PLAIN LANGUAGE OF RULE 56, AS APPLIED IN THE *CELOTEX* CASE.

A central feature of federal procedure is found in Federal Rule 56, the rule governing summary judgment practice. One of the most significant issues in a

summary judgment motion is which party bears the burden of showing a genuine issue of material fact. Although a number of courts formerly held that the burden was upon the moving party to show that there is no genuine issue of material fact, this Court now rejects such a holding.

In *Celotex Corp. v. Catrett*, this Court laid down fundamental principles regarding federal summary judgment procedure. It rejected the argument that the movant always bears the burden of showing the existence of a genuine issue of material fact. Instead, the burden of showing the existence of a triable fact issue is on the party that will bear the burden of proof on that issue at trial.

Celotex was an asbestos case. The plaintiff contended that Celotex products were the source of asbestos fibers that caused her decedent's death. Celotex moved for summary judgment, contending that there was no proof that the decedent had ever been exposed to its products. The defendant submitted no proof in support of her motion. Although the plaintiff submitted several opposing affidavits, they were found to be inadmissible as hearsay. Thus, there was no evidence as to whether the decedent had been, or had not been, exposed to the Celotex products.

The District of Columbia Circuit denied summary judgment on the ground that the party moving for summary judgment bears the burden of providing the absence of a genuine issue of fact, "even on issues where the other party would have the burden of proof at trial." *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 185 (D.C. Cir. 1985).

On certiorari, this Court rejected this principle asserted by the District of Columbia Circuit and reversed, holding that on summary judgment motions, the trial court must rule against the party who will bear the burden of proof on that issue at trial on all issues in which no evidence is presented.

Celotex establishes the principles regarding federal summary judgment practice. It establishes that

- Regardless of which party moves for summary judgment, the burden is on the party with the burden of proof at trial to demonstrate that there is a genuine factual dispute, and

- If there is no evidence on a critical issue of the case, Rule 56 "mandates" the entry of summary judgment against the party having the burden of proof at trial.

With these principles in mind, we turn to the decision below.

A. THE INITIAL PANEL OPINION IGNORED THIS COURT'S MANDATE IN THE *CELOTEX* CASE.

The initial panel opinion plainly violated this Court's ruling in *Celotex Corp. v. Catrett* in several regards.

First, despite the *Celotex* holding that the burden is on the party having the burden of proof at trial, the Second Circuit panel premised its decision upon a

misstatement of the law. It asserted that

> Public Service bore the burden of "demonstrat[ing] the absence of any genuine factual dispute."

(App. 36a)

Celotex v. Catrett unequivocally rejected the premise of the initial opinion, its assertion that the party moving for summary judgment bears the burden of proof. It is not the moving party but the party with the burden of proof at trial that must show that there is an triable issue of fact.

More fundamentally, the initial panel decision missed the basic thrust of the *Celotex* decision. It ignored the holding of that case that, if there was no evidence as to whether the late notice was or was not prejudicial, Rule 56 mandates the entry of summary judgment. It apparently recognized that the was no proof regarding whether "prejudice derived from events prior to September 1995." (App. 40a.)

In addition, even though the *Celotex* requires the plaintiff, not Public Service, to produce evidence of lack of prejudice, the panel did not sustain the summary judgment. Instead, it remanded, erroneously put the burden on "Public Service to show prejudice," (App. 40a.) instead of putting the burden on the plaintiff to show lack of prejudice as required by *Celotex*.

Further even though the *Celotex* opinion "mandates" summary judgment against a party having the burden of proof, who fails to show facts necessary to create a triable issue, as required by *Celotex*, the

initial opinion remanded the case for the development of "a more developed record." Initial Opinion at 17.

Because of these errors under *Celotex v. Catrett*, the petitioner-appellee's rehearing petitions should have been granted. Yet, despite the substantive merit of the rehearing petitions, the Second Circuit denied them, choosing instead to try to rectify the *Celotex* problem using an Errata Sheet.

B. EVEN AFTER BEING REVISED, THE SECOND CIRCUIT OPINION VIOLATES THE *CELOTEX* MANDATE.

In the Errata Sheet revision, the Second Circuit made several changes in an attempt to create a facial accommodation with the principles of *Celotex*. Yet, even with these changes incorporated, the revised opinion still fails to meet the requirements of Rule 56.

For example, although the revised opinion recognized that Peck would have the burden at trial on the lack-of-evidence issue, it did not carry this recognition to the logical conclusion demanded by *Celotex*. The Errata Sheet revision stated that it recognized that the plaintiff was required to "come forward with specific facts showing that there [was] a genuine issue for trial" on the lack of prejudice issue. Despite this recognition, of the plaintiff's obligation, the Second Circuit never identified any evidence in this case to support the denial of summary judgment. In fact there was no such evidence. Instead of identifying the required evidence, the plaintiff had refused, saying that she would do so at trial. Under those facts, the principle of *Celotex v. Catrett* "mandates" that summary judgment be entered.

1. Under any theory, notice to the insurance company was late.

Because the insurance contract required that the insurance company be notified "as soon as practicable" and that copies of the suit papers be sent to the insurance company "immediately," the burden is on the plaintiff. As the Panel Opinion pointed out, Public Service could have learned about the suit against South Norwalk as early as September 12, 1995, some 14 months after suit had been brought and over eight months after the policy on the Rattlesnake went into effect. At that time South Norwalk's codefendant, Rattlesnake, forwarded suit papers to Public Service and requested a defense.

While the panel disagreed with the District Court's assumption that Public Service was not charged with notice until after the default judgment had been rendered against South Norwalk, such an assumption begs the question. While the panel would have recognized notice as of September 12, 1995, the date of notice from the codefendant, the panel ignored the fact that, even with the panel's notice theory, notice was still made over thirteen months after suit was filed.[5] Therefore it was still too late to meet the requirement of the insurance policy. In fact, the District Court clearly cited Connecticut precedent to the effect that a 4-month delay in notice would be a breach of the insurance

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[5] But even if September 12, 1995 is the notice date, it was still too late. The suit had been filed in June 1994. By that date South Norwalk had already retained its own counsel and had already chosen to ignore an offer of judgment.

contract.[6] In short, any theory adopted leads to the same conclusion: Notice to the insurer was late.[7]

2. Under Connecticut law, tardy notice of an insurance claim is a breach of the insurance contract.

A recurring issue in insurance litigation is the question of tardy notice. While state law varies on this issue, the Connecticut rule on tardy notice is clear. In *Aetna Cas. & Surety Co. v. Murphy*, 206 Conn. 409, 412, 538 A.2d 219, 220 (1988), the state Supreme Court laid down its carefully crafted rule. The general rule in tardy notice cases is that:

> [A]n unexcused, unreasonable delay in notification ... entirely discharges an insurance carrier from any further liability on its insurance

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[6] As the District Court's opinion pointed out, the Connecticut Supreme has held that a delay of only four months violates the insurance policy's prompt notice clause. See District Court Opinion, (App. 55a), citing *City of West Haven v. United States Fidelity & Guar. Co.*, 174 Conn. 392, 397, 389 A.2d 741 (1978) for the proposition that even a four-month delay in notice is a breach of breached the insurance contract.

[7] Even if the insured was not obligated notify Public Service until the insurance went into effect, it was a delay of over nine months, see Opinion, 326 F.3d, at 338, still violating the prompt-notice provisions of the insurance contract.

> contract.

206 Conn., at 412, 538 A.2d, at 220. This general rule is subject to an exception — If the tardy notifier affirmatively shows that the late notice was not materially harmful to the insurance company, the breach of contract can be forgiven.

> [T]he burden of establishing lack of prejudice must be borne by the insured.

Aetna Cas. & Surety Co. v. Murphy, 206 Conn., at 419-420, 538 A.2d, at 224.

Because of *Aetna v. Murphy*, the burden of proof at trial on the lack-of-prejudice issue would be on the plaintiff, not the defendant. Therefore, under *Celotex v. Catrett*, when Public Service moved for summary judgment, the burden was on Peck to show specific facts as evidence that the delayed notice did not materially prejudice the insurance company.

Despite the fact that the burden was on her, Peck made no attempt to show that the delay did not prejudice the insurance company. To the contrary, she merely promised that such proof would be forthcoming at trial. Under *Celotex Corp. v. Catrett*, the absence of any proof on an essential element of her claim, such as the lack-of-prejudice issue, mandates summary judgment against the party with the burden of proof on that issue at trial. It therefore mandates summary judgment against the plaintiff.

3. Because the burden at trial on the lack-of-prejudice issue is on the plaintiff, the plaintiff was required to produce specific evidence showing there was a triable issue.

The situation in this case is identical to the situation before this Court in *Celotex Corp. v. Catrett.* The defendant moved for summary judgment but did not offer comprehensive evidence on the lack-of-prejudice issue.[8] On the other hand, the plaintiff had the burden to show that the late notice was not prejudicial to Public Service, but produced no evidence on that issue in opposition to the motion for summary judgment.

The issue of delayed notice was clearly presented in the motion for summary judgment. In the statement of uncontested facts submitted in support of the motion for summary judgment, the defendant asserted:

> In the event of a delayed notice, the burden is on the plaintiff to show that the insurance company was not prejudiced by the delay. *Murphy v. Aetna Cas. & Surety Co.*, 206 Conn. 409, 538, A.2d 219 (1988).

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[8] The defendant did point out, and the record reflects that, even if the codefendent notice theory were accepted, by the time the defendant got notice in September 1995, South Norwalk had already retained its own attorney; that attorney had already filed pleadings that were judicial admissions; and the insured's retained attorney had ignored the deadline on an offer of judgment.

> Because the plaintiff cannot show that the delay was not prejudicial, the plaintiff cannot recover. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

9(c)1 Statement. (App. 65a.)

Although the plaintiff alleged that the defendant received notice through the codefendant as early as September 12, 1995, and the Court of Appeals accepted that theory, in opposing summary judgment, the plaintiff produced no affidavits and no other evidence on the prejudice issue. To the contrary, she simply asserted that, at trial, she "would be permitted to" offer evidence on the lack of prejudice issue. The plaintiff's memorandum opposing summary judgment stated her position very clearly:

> Even if the defendant is permitted to raise the lack of notice defense, ... [t]he plaintiff would still be permitted to offer evidence that the defendant was not prejudiced by the alleged lack of notice.

Memorandum in Opposition to MSJ. (App. 67a.)

Instead of responding to this statement (as required by Local Rule 9(c)2), or producing opposing affidavits (as required by Federal Rule 56(c)), or filing affidavits of unavailability (as permitted by Federal Rule 56(f)), the plaintiff merely submitted a memorandum in opposition to the motion. Specifically, the plaintiff

adduced no proof, provided no opposing affidavits and submitted no affidavits of unavailability to show that Public Service was not prejudiced by the late notice of the lawsuit.[9]

The plaintiff had the burden of proof on the lack-of-prejudice issue, an issue essential to her case. Because the plaintiff had the burden of proof on this essential issue, and submitted no proof on that issue no proof pertinent to that issue, she should lose. The situation was precisely the same as the situation presented in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The result should be the same. The plaintiff's action should have been summarily dismissed.

Because the error below affects a significant issue of federal procedure, the ongoing viability of the *Celotex* doctrine, this Court should grant a writ of certiorari, vacate the decision below and remand for further consideration in light of the continued viability of the principles established in that case.

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[9] The plaintiff's refusal to respond was not limited to the memorandum opposing summary judgment. In her belated 9(c)2 statement, she again admitted that the plaintiff has the burden of proof on the lack-of prejudice issue, and, without offering any proof or evidence in response to the summary judgment motion, the 9(c)2 statement denied that the plaintiff would not be able to prove her case at trial.

4. Because there was no evidence on the lack-of-prejudice issue, an essential element of the plaintiff's case, Rule 56 "mandates" the entry of summary judgment against the plaintiff, the party having the burden of proof on that issue.

Because the plaintiff offered no proof on the lack of prejudice issue, summary judgment against her was required. Even though the *Celotex* case "mandates" summary judgment for the defendant, *Celotex*, 477 U.S., at 322, the Court of Appeals reversed the District Court's summary judgment and remanded the case. Because the *Celotex* rule requires the entry of summary judgment, the District Court's summary judgment should have been affirmed. Accordingly, the decision of the Court of Appeals was erroneous, and should be reversed.

Rule 56 is clear. It states that if there is no genuine issue of material fact, summary judgment sought "shall be rendered forthwith."

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c). Based on the language of this rule, Justice Rehnquist, speaking for this Court, emphatically declared that if the party opposing summary judgment

has the burden of proof on an issue and fails to make a showing on that issue, the summary judgment rule does not merely permit summary judgment. It "mandates" the entry of summary judgment.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. ...

477 U.S., at 322. In other words, Rule 56 requires the entry of summary judgment, not a remand for further development of the record.

In this case, Peck, the nonmoving party, had the burden of showing the absence of prejudice to Public Service resulting from the late notice. She provided no evidence at all to meet this burden. Accordingly, Rule 56 "mandates" the entry of summary judgment. 477 U.S., at 322. Any other holding would violate *Celotex Corp. v. Catrett.*

Because the court below ignored the "mandate" of Rule 56 requiring that summary judgment be granted, and the error affects a significant issue of federal procedure, the ongoing viability of the *Celotex* doctrine, this Court should grant a writ of certiorari, vacate the decision below and remand for further consideration in light of the continued viability of the principles established in that case.

TWO. THE COURT OF APPEALS MISUSED ITS PROCEDURE BY MAKING SUBSTANTIVE CHANGES IN ITS OPINION BY AN ERRATA SHEET, THUS CUTTING OFF THE DEFENDANT'S RIGHT TO PETITION FOR A REHEARING ON ISSUES RAISED BY THOSE CHANGES.

Court rules are designed and implemented to assist the courts and the litigants in achieving that most illusory of goals — the "just, speedy and inexpensive" resolution of every action. Federal Rule 1.

A critical mechanism in seeking to achieve this goal in the Courts of Appeals is the right of a party to seek a rehearing. See Appellate Rules 35 and 40. The rehearing procedure allows the litigant an opportunity to submit a petition responding to the Court's decision. The arguments in the petition will certainly result in the court's rethinking its initial decision, and may result in the Court's modification of its order.

In this case, the petitioner-appellee sought a rehearing to correct the Initial Panel Opinion, which totally missed the *Celotex* issue. The purpose of the rehearing proceeding was to raise the *Celotex* issue again. Although errata sheets are an appropriate way to make noncontroversial changes (e.g., clerical errors, scriveners' errors, etc.), the Court of Appeals responded by filing an Errata Sheet making very significant changes in the initial opinion. It withdrew the holding that the burden of proof was on the movant. It allowed the District Court the option of reconsidering the case on the present record instead of requiring a "more developed record."

But the Errata Sheet revision failed at the most critical point. Though recognizing the plaintiff's duty to identify specific facts showing lack of prejudice, it totally failed to implement this burden. It failed to recognize that, because there are no facts showing lack of prejudice, the plaintiff's case fails.

By making these changes in the format used for correcting noncontroversial instead of granting the rehearing petition, and by making the changes after the time for a rehearing petition had expired, the Second Circuit effectively cut off the petitioner-appellee's right to file a rehearing petition on the changes made by the Errata Sheet revision. Such a maneuver deprived the petitioner-appellee of the opportunity of showing that, even though the revision eliminated some of the *Celotex* problem, it missed the big issue. It missed the fact that there is no evidence in the record to show that a triable issue exists on the lack-of-prejudice issue. Accordingly, the plaintiff, as the party with the burden of proof at trial, loses. The failure to allow the petitioner-appellee to address those issues will result in an unnecessary remand, together with all the unnecessary loss of time, and unnecessary expense associated with this needless procedure.

CONCLUSION

Despite the clear "mandate" of Rule 56 and *Celotex Corp. v. Catrett*, the panel reversed the summary judgment. Instead of "rendering judgment forthwith," the panel remanded the case to determine "whether Public Service may ... show prejudice on a more developed record. ..." (App. 22a.) This refusal of the panel to affirm summary judgment was error for two reasons.

First, it violates the mandate of Rule 56 and the holding of *Celotex Corp. v. Catrett.* Since the plaintiff produced no evidence to show lack of prejudice, the summary judgment was the required remedy. Since it violated *Celotex v. Catrett*, it was error.

Second, the Second Circuit's use of a clerical error procedure to make significant substantive changes in the panel's opinion deprived the petitioner-appellee of the right to seek a rehearing under Appellate Rules 35 and 40, eliminating the petitioner-appellee's right to point out the fact that, even after the Errata Sheet revision, the opinion still violates *Celotex v. Catrett.*

Because this Court's precedent "mandates" the entry of summary judgment, the opinion of the Court of Appeals should be vacated and the summary dismissal should be

reinstated.

Petitioner respectfully requests this Court to grant the writ of certiorari, vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case to that court with directions to reconsider its opinion in the light of the continued viability of the doctrine of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Alternatively, if this Court wishes to reconsider its holding in *Celotex v. Catrett*, the petitioner prays that the writ be granted and the case be set down for full briefing on that issue.

Respectfully submitted,

Oliver B. Dickins
Attorney for Petitioner

Docket No. 01-9459

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELLEN M. PECK,
Plaintiff-Appellant,

v.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,
Defendant-Appellee,

GREATER NEW YORK MUTUAL INSURANCE COMPANY,
Defendant.

October 1, 2002, Argued
April 17, 2003, Decided

COUNSEL: JOHN W. MILLS, Murphy and Karpie, LLC, Bridgeport, CT, for Plaintiff-Appellant.

OLIVER B. DICKINS, Simsbury, CT, for Defendant-Appellee.

JUDGES: Before: MINER, SOTOMAYOR, and KATZMANN, Circuit Judges.

OPINION: MINER, Circuit Judge:

Plaintiff-appellant Ellen M. Peck appeals from a summary judgment entered in the United States District Court for the District of Connecticut (Goettel, J.) dismissing her action to recover damages from defendant-appellee Public Service Mutual Insurance Company ("Public Service") under Connecticut's direct

action statute, Conn. Gen. Stat. § 38a-321 (2000). This action arises out of an underlying tort action brought by Peck in Connecticut Superior Court against, inter alia, South Norwalk Redevelopment Limited Partnership ("South Norwalk"). South Norwalk never notified its insurer, Public Service, of Peck's tort action. A default judgment was subsequently entered against South Norwalk as a result of its failure to respond to Peck's outstanding discovery requests, and a jury later awarded Peck $250,000 in damages. As part of a settlement with Peck, South Norwalk assigned to her whatever claims it had against Public Service.

After Peck filed the instant diversity action against Public Service, the latter moved for summary judgment on several grounds, one of which was that Public Service had been materially prejudiced by South Norwalk's failure to provide it with timely notice of Peck's underlying tort action. It was solely upon this ground that the District Court entered summary judgment for Public Service and dismissed Peck's complaint. For the reasons set forth below, we conclude that the District Court erred in holding as a matter of law that Peck failed to carry her burden of showing that Public Service was not materially prejudiced by any untimely notice Public Service received of Peck's underlying tort action. Accordingly, we vacate the summary judgment and remand the case to the District Court for proceedings consistent with this opinion.

BACKGROUND

I. Events Leading Up to Peck's Underlying Tort Action

South Norwalk, a Connecticut limited partnership, owned the Washington Market Building in South Norwalk, Connecticut. On May 12, 1992, South Norwalk entered into a ten-year commercial lease with

Rattlesnake Ventures, Inc. ("Rattlesnake"), a Connecticut corporation, for premises in Washington Market Building to be used for the operation of a "full-service restaurant" called the Rattlesnake Bar and Grill. The lease required, in relevant part, that Rattlesnake purchase commercial liability insurance, that Rattlesnake name South Norwalk as an additional insured on the policy, and that Rattlesnake deposit the policy with South Norwalk.

Peck owned and resided in a condominium unit located directly above the premises leased by Rattlesnake in the Washington Market Building. In or about October 1992, live rock and roll bands began performing several nights a week between the hours of 9:00 p.m. and 2:00 a.m. at the Rattlesnake Bar and Grill. According to Peck, these live performances resulted in "incredibly loud noises and vibrations . . . emanating" into the street and throughout her condominium unit, in violation of local noise ordinances. Peck's complaints to the Rattlesnake Bar and Grill about the noise went unremedied. Instead, Peck alleged that she was subjected to "vulgar and obscene comments" from the staff of the Rattlesnake Bar and Grill and threatened with physical harm. On one occasion, Peck claimed that someone spread cooking grease on the stairs leading to her condominium.

II. Peck's Filing of the Underlying Tort Action and South Norwalk's Bankruptcy Filing

Neither the noise nor Peck's distaste for the late night rock and roll music abated. Consequently, on June 23, 1994, Peck filed suit in Connecticut Superior Court against Rattlesnake, South Norwalk, and William Opper, the President of Rattlesnake, pleading causes of action for negligence per se, intentional and negligent infliction of emotional distress, and violations of Connecticut's

Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110b et seq. In particular, Peck alleged that she had been "routinely and regularly . . . subjected to excessively loud music, vibration, and crowd noise . . . on an ongoing, regular basis since October 1992," resulting in: "regular loss of sleep"; "needless anxiety and severe emotional distress"; "regular deprivation of her rightful enjoyment to the peace, quiet and enjoyment of her home"; and "severe impairment to the value of and diminution in her dwelling place." She sought money damages and injunctive relief. Five days after Peck's complaint was filed, attorney G. Kenneth Bernhard of the Law Firm Goldstein and Peck, P.C. [n1] entered an appearance on behalf of "all defendants."

On August 15, 1994, South Norwalk filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut. [n2] Two weeks later, Peck filed a Revised Complaint, and on October 6, Rattlesnake and Opper filed their answer. On December 6, 1994, attorney Paul L. McCullough filed a notice of appearance for South Norwalk. McCullough had represented South Norwalk in connection with the Rattlesnake lease.

III. The Public Service Insurance Policy

It was not until January 10, 1995 - more than six months after the underlying tort action was commenced and about five months after South Norwalk filed for bankruptcy - that Public Service, a New York corporation, issued an insurance policy to Rattlesnake, naming South Norwalk as an additional insured. The policy defined the policy period as "12/01/94 to 12/01/95 12:01 a.m." The policy further provided that it applied to "bodily injury" or "property damage" only if the "bodily

injury" or "property damage" occurred "during the policy period." The policy defined "bodily injury" as "bodily injury, sickness or disease sustained by a person" and "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." Finally, South Norwalk was required to notify Public Service "as soon as practicable" of any occurrence that might result in a claim or of any claim or suit, and "immediately" to send copies of any demands, notices, summonses, or legal papers received in connection with a claim or lawsuit.

IV. The Underlying Litigation Progresses and Rattlesnake Notifies Public Service of the Underlying Tort Action

On January 23, 1995, the law firm of Gildea & Stevens, which had been retained by another Rattlensake insurer, Greater New York Mutual Insurance Company, n3 filed a notice of appearance on behalf of Rattlesnake and Opper. On March 23, attorney Thomas E. Stevens of Gildea & Stevens filed an amended answer and special defense on behalf of Rattlesnake and Opper. The following month, Peck made an offer to Rattlesnake, agreeing to accept $ 75,000 in full settlement of her claims. The offer was rejected.

By letter dated September 8, 1995, attorney Eugene E. Cedarbaum of Goldstein and Peck, requested that Ronald Fitelson, Rattlesnake's insurance broker, notify Public Service of the underlying tort action. Four days later, Fitelson faxed to Public Service a Loss Notice and the Summons, which separately listed each defendant in the underlying action. Fitelson also instructed Public Service to contact attorney Cedarbaum. On September 14, Daniel Jaconetti, the head of litigation at Public Service, set up a claims file and filled out a "Claims

Division Transaction Sheet." The following day, he opened a claims file in which he made handwritten notes about the claims alleged in Peck's complaint, and assigned the file to insurance adjuster Barry Blecher. As to the Ninth and Tenth Counts of the complaint, which alleged negligence per se and negligent infliction of emotional distress against South Norwalk, Jaconetti wrote "Possibly Depending upon lease Agr. and if Co-Defendant is ADD'l. INSD. on Policy." Jaconetti also wrote "Has Co-Defendant Sought Def. + Indem. From Insd?" and "Has Anyone Answered For Co-Defendant Yet?"

On September 29, attorney Cedarbaum forwarded a copy of Peck's August 1994 Revised Complaint to Public Service. On October 5, Blecher faxed a two-page document to Cederbaum, asking him to identify South Norwalk and whether it was the landlord of the property leased by Rattlesnake. A week later, Blecher sent another letter to attorney Cederbaum confirming receipt of the original summons and complaint, the Revised Complaint, and explaining that he needed a copy of the lease to help Public Service determine its "position regarding the availability of coverage." On October 20 attorney Cederbaum sent Blecher copies of various papers pertaining to the litigation, and indicated that he would soon send a copy of the lease. Additionally, Cederbaum informed Blecher that "[t]he premises on which the restaurant is located is rented from South Norwalk" and that Peck's deposition was scheduled for October 26.

In early November, Public Service received a copy of the lease agreement. On November 28, Public Service sent a letter to Rattlesnake denying insurance coverage to Rattlesnake on the grounds that (1) the date of the loss was October 1992, prior to the 1994 effective date of the

policy; (2) notice of the claim was not timely provided by Rattlesnake (over a year after service of the complaint); and (3) intentional acts were excluded from the policy's coverage. No disclaimer of coverage was ever sent to South Norwalk, and South Norwalk was not referred to in the letter.

V. Default Judgment Entered Against South Norwalk in the Underlying Tort Action

On August 28, 1996 - six months after the automatic stay in the South Norwalk bankruptcy proceeding was lifted with respect to Peck's action against South Norwalk – Peck served South Norwalk with interrogatories and document production requests. South Norwalk failed to respond to these discovery requests, and by motion dated November 25, 1996, Peck moved for the entry of a default against South Norwalk. A copy of the notice was sent to attorney McCullough, among others. A default judgment was entered against South Norwalk on July 21, 1997.

VI. The Underlying Action Proceeds to Trial Without South Norwalk's Participation

In April 1997, Peck filed an offer of judgment to settle the case against South Norwalk for $ 25,000, which was never accepted. On May 29, 1998, attorney Brian M. Gildea of Gildea and Associates entered an appearance in the underlying action on behalf of "[a]ll defendants," although attorney McCullough had previously appeared for South Norwalk. On June 1, 1998, Peck filed an Amended Complaint that was substantially similar to the original complaint. The only difference was the addition of allegations pertaining to the injuries sustained by Peck. [n4]

At a July 1998 pretrial conference (at which attorney Gildea was in attendance), attorney McCullough indicated that he would not be participating in the trial because of his belief (later admitted by him to have been mistaken) that South Norwalk's liability to Peck had been discharged in the bankruptcy proceeding (which he believed had been converted from a Chapter 11 into a Chapter 7 proceeding). n5 McCullough also indicated at the pretrial conference his belief that Peck's claim was covered by insurance, although he stated that he did not know the identity of the insurance company providing coverage. The Superior Court judge explained to McCullough that it was up to him and his client "to notify the insurance company" of the claim and that if the insurer wanted "to come in and ask for a continuance," the court would consider such a request. The court continued: "So if you could notify the insurance company as soon as possible I would appreciate it . . . . Actually not appreciated. I will order it." Notwithstanding this unequivocal "order," McCullough later admitted that he never notified Public Service.

Immediately upon overhearing the colloquy between the Superior Court judge and attorney McCullough concerning the notice to South Norwalk's insurer, attorney Gildea notified a claims handler at Public Service that the trial in the case was scheduled to commence shortly and that South Norwalk's counsel had been given permission not to attend. According to Gildea, the claims handler responded that Public Service "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." The trial proceeded to verdict without South Norwalk's participation, Rattlesnake and Opper being defended by the two other insurers that insured only Rattlesnake, and McCullough

testifying as a fact witness in Peck's rebuttal case. On or about August 4, 1998, the jury returned a verdict against the defendants, and awarded damages in the amount of: (1) $ 225,000 against Rattlesnake and Opper on the negligence per se claims; (2) $ 200,000 against Rattlesnake on the negligent or intentional infliction of emotional distress claims; (3) $ 200,000 against Opper on the negligent or intentional infliction of emotional distress claims; and (4) with respect to the default judgment against South Norwalk, $ 250,000. [n6] Subsequently, Rattlesnake and Opper filed various motions to set aside the verdict or for remittiturs.

Attorney Cederbaum notified Public Service of the verdict in a September 1998 letter and invited the insurer to participate in post-judgment efforts to settle or appeal the case. The following month, Blecher responded by requesting a copy of the trial transcript. On November 19, 1998, the Superior Court granted Rattlesnake's and Opper's request to set aside the $ 200,000 awarded to Peck for negligent or intentional infliction of emotional distress, finding those injuries to have been compensated in the jury's award on the negligence per se counts. Final judgment was entered on November 20, 1998.

On April 4, 1999, counsel for Peck sent a letter to Blecher confirming the tort judgment, indicating that "[i]n accordance with the lease agreement [between South Norwalk and Rattlesnake], South Norwalk . . . was named as an additional insured . . ., and properly appears as such on the declarations page," and formally demanding that Public Service "satisfy" the judgment rendered against South Norwalk. In September 1999, as part of a settlement with Rattlesnake and Peck, South Norwalk assigned whatever claim(s) it had against Public Service to Peck in exchange for one dollar and a

covenant contained in a subsequent letter from Peck not to pursue any claims against South Norwalk for any judgment not covered by insurance and to limit her recovery to the available insurance proceeds.

VII. Proceedings in the District Court

In May 1999, Peck sued Public Service as assignee and subrogee of South Norwalk in the District Court under Connecticut's direct action statute, Conn. Gen. Stat. § 38a-321. n7 The Complaint was amended on April 5, 2000, and alleged that Public Service (1) breached its insurance contract with South Norwalk; (2) breached the implied covenant of good faith in that contract; (3) violated the Connecticut Unfair Insurance Practices Act, id. §§ 38a-815 et seq.; (4) violated Connecticut's Unfair Trade Practices Act, id. §§ 42-110b et seq.; and (5) breached its duty to Peck, who was alleged to be a third-party beneficiary of the insurance contract. In June 2001, Public Service moved for summary judgment on the grounds that (1) South Norwalk failed to provide timely notice of the claim, (2) there was no coverage due to the fact that the underlying action was filed before the policy's effective date, and (3) there was no coverage due to the fact that the injuries alleged by Peck were not covered by the policy.

In a November 11, 2001 unpublished decision and order, the District Court granted summary judgment for Public Service solely on the late notice defense. Applying Connecticut law, the District Court interpreted the notice language in the insurance policy as meaning "within a reasonable period of time under the circumstances of the case." The District Court then proceeded to examine the evidence regarding timeliness of the notice, commenting that it was "uncontested that [South Norwalk] did not comply with the policy

requirement that it provide [Public Service] with notice of the suit as soon as practicable nor did it send copies of the legal papers to its insurer." Indeed, South Norwalk "never specifically asked for representation or a defense, apparently believing that, because the suit had begun before the policy went into effect, there would be no coverage." Instead, the District Court observed, South Norwalk undertook its own defense, which the District Court characterized as, "if not a sham, an absolute disaster."

The District Court then concluded that Peck had failed to satisfy her burden under Connecticut law of showing that Public Service was not materially prejudiced by South Norwalk's failure to give timely notice of the underlying action. According to the District Court, it was "hard to imagine any greater prejudice to [Public Service] than a demand for payment of a default judgment of which it was totally ignorant and as to which, through [South Norwalk's] failure to comply with the terms of the contract, [Public Service] has been deprived of its right to defend." Indeed, because South Norwalk failed to cure the default and defend on the merits, the District Court opined that an argument could be made that South Norwalk "was colluding with [Peck] since ultimately it was assured that neither it nor its general partners would be subject to any claim." Accordingly, summary judgment was granted without reaching the other arguments advanced by Public Service.

Peck subsequently moved for reconsideration of the District Court's decision and for relief from the judgment, arguing, inter alia, that by failing to send a letter to South Norwalk rejecting coverage or reserving its rights, Public Service had waived its late notice defense. The District Court denied the motions in

another unpublished decision. This timely appeal followed.

DISCUSSION

I. Standard of Review

We review de novo the District Court's grant of summary judgment and construe the evidence in the light most favorable to Peck. See McCarthy v. Am. Int'l Group, 283 F.3d 121, 123 (2d Cir. 2002). Summary judgment here would have been "appropriate if there [were] no genuine issues of material fact" and Public Service had been "entitled to judgment as a matter of law." Id. at 123-24 (citing Fed. R. Civ. P. 56(c)). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict" for Public Service. Id. at 124 (internal quotation marks omitted). Thus, with respect to the issue of whether Public Service was materially prejudiced, if there were "any evidence in the record from which a reasonable inference could be drawn in favor of [Peck], summary judgment [would be] improper." Id. (internal quotation marks omitted). Where the non-moving party bears the burden of proof on an issue, as Peck does here on the issue of material prejudice, see infra, Public Service as the moving party may satisfy this burden by "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323. In response, to survive summary judgment, Peck must "come forward with specific facts showing that there [was] a genuine issue for trial" on the Issue of material prejudice. McCarthy, 283 F.3d at 124 (internal quotation marks omitted); see also Celotex, 477 U.S. at 323 ("The moving party is entitled to judgment as a matter of law

[if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."). In light of the theory on which the District Court granted summary judgment in favor of Public Service, we think that Peck has done so here.

II. Connecticut Law Governing Timely Notice and Prejudice

In Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409, 538 A.2d 219 (Conn. 1988), the Connecticut Supreme Court articulated the legal analysis to be applied in a duty to defend case when an insurer raises the defense that its insured failed to comply with the policy's requirement that it provide the insurer with timely notice of a claim. There, the court held that, "[i]f it can be shown that the insurer suffered no material prejudice from the delay, the nonoccurrence of the condition of timely notice may be excused because it is not . . . a material part of the agreed exchange." Id. at 223 (internal quotations omitted). Furthermore, because the insured "is seeking to be excused from the consequences of a contract provision with which [it] has concededly failed to comply," the "burden of establishing lack of prejudice must be borne by the insured," and "the existence or nonexistence of prejudice from delayed notice should be determined on a factual basis." Id. at 224.

The rationales underlying this rebuttable presumption that prejudice follows from untimely notice are that the purpose of the notice provision "'is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances'" and that, "'if the insurer is thus given the opportunity for a timely investigation, reasonable compromises and settlements may be made,

thereby avoiding prolonged and unnecessary litigation.'" Id. at 223 (quoting 8 J. Appleman, Insurance Law and Practice § 4731, at 2-5 (rev. ed. 1981)). This "legitimate purpose of guaranteeing [an insurer] a fair opportunity to investigate accidents and claims can be protected without the forfeiture that results from presuming, irrebuttably, that late notice invariably prejudices the insurer." Id. at 222.

According to Connecticut law, determining whether untimely notice is prejudicial "requires a factual inquiry into . . . the circumstances" surrounding each case in order to strike "a proper balance between the interests of the insurer and the insured." Id. at 223. However, Connecticut's courts have not provided specific guidance on what constitutes "material prejudice" in an untimely notice case.

III. Whether There Were Genuine Issues of Material Facts Concerning Notice to, and Material Prejudice Suffered by, Public Service?

Here, the District Court's conclusion that Peck failed as a matter of law to meet her burden to demonstrate that Public Service was materially prejudiced was based on the findings that Public Service was subjected to a "demand for payment of a default judgment of which it was totally ignorant" and that "Public Service ha[d] been deprived of its right to defend." Our review of the evidence presented on the motion for summary judgment leads us to conclude that whether Public Service was "ignorant" of the case giving rise to the default judgment and thus whether it was completely "deprived of its right to defend" present unresolved questions of fact.

There are factual disputes concerning what Public

Service knew about Peck's underlying tort action and when it knew it. Whereas the default judgment was not requested until November 1996 and was not granted until July 1997, Public Service received notice of the action against South Norwalk through Rattlesnake's counsel in September 1995, eight months after the policy was purchased (the earliest point at which notice could have been given) but almost two years before the default was entered. Whether notice from South Norwalk's coinsured/codefendant can serve as notice from South Norwalk, and thus whether the prejudice to Public Service should be measured only by the events prior to September 1995, present unresolved questions of Connecticut law and questions of fact, both of which should be addressed by the District Court in the first instance. For example, some jurisdictions have held that notice provided by one codefendant/coinsured is sufficient to satisfy the contractual notice obligation of another co-defendant/co-insured only if the insurer receives actual notice that the other co-defendant/co-insured was served with process. See Campbell v. Cont'l Cas. Co., 170 F.2d 669, 671 (8th Cir. 1948) (applying Missouri law and stating that "neither the language of the policy, nor the construction made by any court of such provisions as it contains, has imposed on the insurer, merely because it knows that an insured has been named as a defendant in an action, the sentry duty of tracking back and forth to the court house to keep a check on if or when he may be served with process."); see also Indem. Ins. Co. v. Forrest, 44 F.2d 465, 466 (9th Cir. 1930); 14 Couch on Insurance §§ 199:97 (2002) (Westlaw online). Although the September 1995 notice was provided in the form of a summons naming South Norwalk as a defendant, the record before us does not reveal whether Public Service received notice that South Norwalk was served with process.

Furthermore, presuming the September 1995 notice is valid as to South Norwalk, it is uncertain whether the Revised Complaint Public Service received could serve as notice of conduct for which Public Service could be liable during the coverage period running from December 1994 to December 1995. The Revised Complaint alleged personal and property damages sustained "on an ongoing, regular basis since October 1992"; it was filed, however, in August 1994 before the policy period commenced. Whether the allegations in this complaint, combined with other information in the possession of Public Service, may serve as notice of conduct occurring after the complaint was filed presents both an unresolved question of Connecticut law and questions of fact that should be addressed by the District Court in the first instance, if necessary. Because of these same issues of timing, it is also unclear whether the default judgment, which was entered only on the basis of the Revised Complaint, could legally make Public Service liable for any occurrences during the policy period.

Additional evidence also suggests that Public Service was not ignorant of South Norwalk's involvement in the lawsuit, including Jaconetti's notations in the case file, Blecher's request from Rattlesnake's attorney for additional information regarding South Norwalk, and Public Service's receipt of the lease agreement requiring Rattlesnake to procure insurance and name South Norwalk as an additional insured. Under Connecticut law, the burden lies on Peck to demonstrate Public Service's lack of prejudice. However, at this point there is no evidence in the record that Public Service would have acted differently from September 1995 forward if it had received the notice directly from South Norwalk, given the reasons Public Service gave for disclaiming coverage in its November 1995 communication with

Rattlesnake.

Our holding on the prejudice issue is limited. We hold only that the District Court erred in deciding as a matter of law that Public Service did not have sufficient notice of Peck's claims against South Norwalk at any point prior to the entry of the default judgment based on the record before it; we express no opinion whether Public Service may on remand meet its burden as the moving party on a summary judgment motion to demonstrate the absence of a genuine issue of material fact on the material prejudice issue, Celotex, 477 U.S. at 322-23, based either on the same record and a different theory of prejudice, such as prejudice derived from the events prior to September 1995 (provided that the theory has not been waived in the district court), or on a more developed record responding to the showing Peck has made and clarifying the extent of the notice it received in September 1995. These are issues for the District Court to address in the first instance. Likewise, because the District Court declined to reach the contentions other than notice and prejudice advanced by Public Service in support of its motion for summary judgment, we express no opinion on them and remand them to the District Court.

CONCLUSION

For the foregoing reasons, we vacate the summary judgment entered by the District Court and remand the case for further proceedings consistent with this opinion.

FOOTNOTES

[n1] There is no indication that this Peck, a member of the firm acting on behalf of Rattlesnake and Opper, had

any relationship to the plaintiff Peck in the underlying action.

[n2] Peck's motion to lift the automatic stay of her tort action against South Norwalk was granted on February 9, 1996, after several prior attempts to lift the stay had failed.

[n3] In addition to the insurance purchased from Public Service, Rattlesnake also purchased insurance policies from Greater New York Mutual Insurance Company and the Aetna insurance company, naming only itself as insured.

[n4] The Amended Complaint also may have been filed to bring the alleged misconduct of South Norwalk within the period that South Norwalk was covered by the Public Service policy. The allegations made clear that Peck sustained injuries "on an ongoing, regular basis since October 1992," i.e., up to and including the filing date of the Amended Complaint.

[n5] Indeed, an examination of the Bankruptcy Court's docket reveals not only that there had been no discharge, but also that the bankruptcy petition had been voluntarily dismissed in May of 1997 - two months before the default judgment against South Norwalk was entered.

[n6] It is not clear from the record (1) why there was a $25,000 discrepancy between the damages assessed against Rattlesnake and South Norwalk; and (2) whether these damages were cumulative so that any sums paid by Rattlesnake would also satisfy South Norwalk's judgment or whether they were "independent" damages.

[n7] Greater New York Mutual Insurance Company also

was named as a defendant in this lawsuit but was dismissed by stipulation on April 4, 2000.

ERRATA

PAGE(s) (Slip Opinion Pages)	LINE(s)	DELETE	INSERT
2319	14	See id. at 124	Id. at 124
2319	19	See id.	id.
2319	19-25	To this end. Public Service bore the burden of "demonstrat[ing] the absence of any genuine factual dispute." See id. And to survive summary judgment Peck had to "come forward with specific facts showing that there [was] a genuine issue for trial" on the issue of material prejudice. See id. (internal quotations marks omitted). We think that she has done so.	Where the non-moving party bears the burden of proof on an issue, as fleck does here on the issue of material prejudice. see infra. Public Service as the moving party may satisfy this burden by "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a

genuine issue of material fact." Celotex Corp. v. Garrett, 477 U.S. 317, 323 (1986). In response, to survive summary judgment. Peck must "come forward with specific facts showing that there [was] A genuine issue for trial" on the issue of material prejudice. McCarthy, 283 F.3d at 124 (internal quotation marks omitted); see also Celotex, 477 U.S. at 323 ('The moving party is entitled no judgment as a matter of law [if] the nonmoving party has filed to make a sufficient showing on an essential element of her case with respect to when she has the burden of proof ") In light of the theory on which the district court granted summary judgment to favor of Public

Service, we think that Peck has done so here.

2323	21-24	show prejudice on a more developed record or on the current record based on a different theory, such as prejudice derived from the events prior to September 1995, provided the theory has not already been waived to the District Court.	meet its burden as the moving party on a summary judginent motion to demonstrate the absence of a genuine issue of material fact on the material prejudice issue, Celotex, 477 U.S. at 322-23, based either on the same record and a different theory of prejudice, such at prejudice derived from the events prior to September 1995 (provided that the theory has not been waived to the district court), or on a more developed record responding to the showing Peck has made and clarifying the extent of the notice it received to September 1995.

These are issues for the District Court to address in the first instance.

Docket No. 01-9459

United States Court of Appeals For the Second Circuit
August Term, 2002

ELLEN M. PECK,
Plaintiff Appellant,

-v-

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,
Defendant-Appellee,

GREATER NEW YORK MUTUAL INSURANCE COMPANY,
Defendant.

Argued: October 1, 2002
Decided: April 17, 2003

Before: MINER, SOTOMAYOR, and KATZMANN, Circuit Judges.

Plaintiff-appellant, as assignee and judgment creditor of defendant- appellee's insured, appeals from a summary judgment entered in the United States District Court for the District of Connecticut (Goettel, J.), dismissing her action to recover damages under Connecticut's direct action statute, the District Court having found that defendant-appellee properly disclaimed coverage because it was materially prejudiced by the insured's lack of timely notice with respect to the underlying claims brought by plaintiff-appellant against the insured.

Vacated and remanded.

JOHN W. MILLS, Murphy and Karpie, LLC, Bridgeport, CT, for PlaintiffAppellant.

OLIVER B. DICKINS, Simsbury, CT, for Defendant-Appellee.

MINER, Circuit Judge:

Plaintiff-appellant Ellen M. Peck appeals from a summary judgment entered in the United States District Court for the District of Connecticut (Goettel, J.) dismissing her action to recover damages from defendant-appellee Public Service Mutual Insurance Company ("Public Service") under Connecticut's direct action statute, Conn. Gen. Stat. § 38a-321 (2000). This action arises out of an underlying tort action brought by Peck in Connecticut Superior Court against, inter alia, South Norwalk Redevelopment Limited Partnership ("South Norwalk"). South Norwalk never notified its insurer, Public Service, of Peck's tort action. A default judgment was subsequently entered against South Norwalk as a result of its failure to respond to Peck's outstanding discovery requests, and a jury later awarded Peck $250,000 in damages. As part of a settlement with Peck, South Norwalk assigned to her whatever claims it had against Public Service.

After Peck filed the instant diversity action against Public Service, the latter moved for summary judgment on several grounds, one of which was that Public Service had been materially prejudiced by South Norwalk's failure to provide it with timely notice of Peck's underlying tort action. It was solely upon this ground that the District Court entered summary judgment for Public Service and dismissed Peck's complaint. For the reasons set forth below, we conclude that the District Court erred in holding as a matter of

law that Peck failed to carry her burden of showing that Public Service was not materially prejudiced by any untimely notice Public Service received of Peck's underlying tort action. Accordingly, we vacate the summary judgment and remand the case to the District Court for proceedings consistent with this opinion.

BACKGROUND

I. Events Leading Up to Peck's Underlying Tort Action

South Norwalk, a Connecticut limited partnership, owned the Washington Market Building in South Norwalk, Connecticut. On May 12, 1992, South Norwalk entered into a tenyear commercial lease with Rattlesnake Ventures, Inc. ("Rattlesnake"), a Connecticut corporation, for premises in Washington Market Building to be used for the operation of a "full-service restaurant" called the Rattlesnake Bar and Grill. The lease required, in relevant part, that Rattlesnake purchase commercial liability insurance, that Rattlesnake name South Norwalk as an additional insured on the policy, and that Rattlesnake deposit the policy with South Norwalk.

Peck owned and resided in a condominium unit located directly above the premises leased by Rattlesnake in the Washington Market Building. In or about October 1992, live rock and roll bands began performing several nights a week between the hours of 9:00 p.m. and 2:00 a.m. at the Rattlesnake Bar and Grill. According to Peck, these live performances resulted in "incredibly loud noises and vibrations ... emanat[ing]" into the street and throughout her condominium unit, in violation of local noise ordinances. Peck's complaints to the Rattlesnake Bar and Grill about the noise went unremedied. Instead,

Peck alleged that she was subjected to "vulgar and obscene comments" from the staff of the Rattlesnake Bar and Grill and threatened with physical harm. On one occasion, Peck claimed that someone spread cooking grease on the stairs leading to her condominium.

II. Peck's Filing of the Underlying Tort Action and South Norwalk's Bankruptcy Filing

Neither the noise nor Peck's distaste for the late night rock and roll music abated. Consequently, on June 23, 1994, Peck filed suit in Connecticut Superior Court against Rattlesnake, South Norwalk, and William Opper, the President of Rattlesnake, pleading causes of action for negligence per se, intentional and negligent infliction of emotional distress, and violations of Connecticut's Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110b et seq. In particular, Peck alleged that she had been "routinely and regularly ... subjected to excessively loud music, vibration, and crowd noise ... on an ongoing, regular basis since October 1992," resulting in: "[r]egular loss of sleep"; "[n]eedless anxiety and severe emotional distress"; "[r]egular deprivation of her rightful enjoyment to the peace, quiet and enjoyment of her home"; and "[s]evere impairment to the value of and diminution in her dwelling place." She sought money damages and injunctive relief. Five days after Peck's complaint was filed, attorney G. Kenneth Bernhard of the Law Firm Goldstein and Peck, P.C.[1] entered an appearance on behalf of "[a]11 defendants."

On August 15, 1994, South Norwalk filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut.[2] Two weeks later, Peck filed a Revised Complaint, and on October 6, Rattlesnake and Opper filed their answer. On December

6, 1994, attorney Paul L. McCullough filed a notice of appearance for South Norwalk. McCullough had represented South Norwalk in connection with the Rattlesnake lease.

III. The Public Service Insurance Policy

It was not until January 10, 1995 - more than six months after the underlying tort action was commenced and about five months after South Norwalk filed for bankruptcy - that Public Service, a New York corporation, issued an insurance policy to Rattlesnake, naming South Norwalk as an additional insured. The policy defined the policy period as "12/01/94 to 12/01/95 12:01 a.m." The policy further provided that it applied to "bodily injury" or "property damage" only if the "bodily injury" or "property damage" occurred "during the policy period." The policy defined "bodily injury" as "bodily injury, sickness or disease sustained by a person" and "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." Finally, South Norwalk was required to notify Public Service "as soon as practicable" of any occurrence that might result in a claim or of any claim or suit, and "immediately" to send copies of any demands, notices, summonses, or legal papers received in connection with a claim or lawsuit.

IV. The Underlying Litigation Progresses and Rattlesnake Notifies Public Service of the Underlying Tort Action

On January 23, 1995, the law firm of Gildea & Stevens, which had been retained by another Rattlensake insurer, Greater New York Mutual Insurance Company,[3] filed a notice of appearance on behalf of Rattlesnake and Opper. On March 23, attorney Thomas E. Stevens of

Gildea & Stevens filed an amended answer and special defense on behalf of Rattlesnake and Opper. The following month, Peck made an offer to Rattlesnake, agreeing to accept $75,000 in full settlement of her claims. The offer was rejected.

By letter dated September 8, 1995, attorney Eugene E. Cedarbaum of Goldstein and Peck, requested that Ronald Fitelson, Rattlesnake's insurance broker, notify Public Service of the underlying tort action. Four days later, Fitelson faxed to Public Service a Loss Notice and the Summons, which separately listed each defendant in the underlying action. Fitelson also instructed Public Service to contact attorney Cedarbaum. On September 14, Daniel Jaconetti, the head of litigation at Public Service, set up a claims file and filled out a "Claims Division Transaction Sheet." The following day, he opened a claims file in which he made handwritten notes about the claims alleged in Peck's complaint, and assigned the file to insurance adjuster Barry Blecher. As to the Ninth and Tenth Counts of the complaint, which alleged negligence per se and negligent infliction of emotional distress against South Norwalk, Jaconetti wrote "Possibly Depending upon lease Agr. and if Co-

lease to help Public Service determine its "position regarding the availability of coverage." On October 20 attorney Cederbaurn sent Blecher copies of various papers pertaining to the litigation, and indicated that he would soon send a copy of the lease. Additionally, Cederbaum informed Blecher that "[t]he premises on which the restaurant is located is rented from South Norwalk" and that Peck's deposition was scheduled for October 26.

In early November, Public Service received a copy of the lease agreement. On November 28, Public Service sent a letter to Rattlesnake denying insurance coverage to Rattlesnake on the grounds that (1) the date of the loss was October 1992, prior to the 1994 effective date of the policy; (2) notice of the claim was not timely provided by Rattlesnake (over a year after service of the complaint); and (3) intentional acts were excluded from the policy's coverage. No disclaimer of coverage was ever sent to South Norwalk, and South Norwalk was not referred to in the letter.

V. Default Judgment Entered Against South Norwalk in the Underlying Tort Action

On August 28, 1996 - six months after the automatic stay in the South Norwalk bankruptcy proceeding was lifted with respect to Peck's action against South Norwalk – Peck served South Norwalk with interrogatories and document production requests. South Norwalk failed to respond to these discovery requests, and by motion dated November 25, 1996, Peck moved for the entry of a default against South Norwalk. A copy of the notice was sent to attorney McCullough, among others. A default judgment was entered against South Norwalk on July 21, 1997.

VI. The Underlying Action Proceeds to Trial Without South Norwalk's Participation

In April 1997, Peck filed an offer of judgment to settle the case against South Norwalk for $25,000, which was never accepted. On May 29, 1998, attorney Brian M. Gildea of Gildea and Associates entered an appearance in the underlying action on behalf of "[a]11 defendants," although attorney McCullough had previously appeared for South Norwalk. On June 1, 1998, Peck filed an Amended Complaint that was substantially similar to the original complaint. The only difference was the addition of allegations pertaining to the injuries sustained by Peck.[4]

At a July 1998 pretrial conference (at which attorney Gildea was in attendance), attorney McCullough indicated that he would not be participating in the trial because of his belief (later admitted by him to have been mistaken) that South Norwalk's liability to Peck had been discharged in the bankruptcy proceeding (which he believed had been converted from a Chapter 11 into a Chapter 7 proceeding).[5] McCullough also indicated at the pretrial conference his belief that Peck's claim was covered by insurance, although he stated that he did not know the identity of the insurance company providing coverage. The Superior Court judge explained to McCullough that it was up to him and his client "to notify the insurance company" of the claim and that if the insurer wanted "to come in and ask for a continuance," the court would consider such a request. The court continued: "So if you could notify the insurance company as soon as possible I would appreciate it .... Actually not appreciated. I will order it." Notwithstanding this unequivocal "order," McCullough later admitted that he never notified Public Service.

Immediately upon overhearing the colloquy between the Superior Court judge and attorney McCullough concerning the notice to South Norwalk's insurer, attorney Gildea notified a claims handler at Public Service that the trial in the case was scheduled to commence shortly and that South Norwalk's counsel had been given permission not to attend. According to Gildea, the claims handler responded that Public Service "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." The trial proceeded to verdict without South Norwalk's participation, Rattlesnake and Opper being defended by the two other insurers that insured only Rattlesnake, and McCullough testifying as a fact witness in Peck's rebuttal case. On or about August 4, 1998, the jury returned a verdict against the defendants, and awarded damages in the amount of. (1) $225,000 against Rattlesnake and Opper on the negligence per se claims; (2) $200,000 against Rattlesnake on the negligent or intentional infliction of emotional distress claims; (3) $200,000 against Opper on the negligent or intentional infliction of emotional distress claims; and (4) with respect to the default judgment against South Norwalk, $250,000.[6] Subsequently, Rattlesnake and Opper filed various motions to set aside the verdict or for remittiturs.

Attorney Cederbaum notified Public Service of the verdict in a September 1998 letter and invited the insurer to participate in post judgment efforts to settle or appeal the case. The following month, Blecher responded by requesting a copy of the trial transcript. On November 19, 1998, the Superior Court granted Rattlesnake's and Opper's request to set aside the $200,000 awarded to Peck for negligent or intentional infliction of emotional distress, finding those injuries to have been compensated in the jury's award on the

negligence per se counts. Final judgment was entered on November 20, 1998.

On April 4, 1999, counsel for Peck sent a letter to Blecher confirming the tort judgment, indicating that "[i]n accordance with the lease agreement [between South Norwalk and Rattlesnake], South Norwalk ... was named as an additional insured .... and properly appears as such on the declarations page," and formally demanding that Public Service "satisfy" the judgment rendered against South Norwalk. In September 1999, as part of a settlement with Rattlesnake and Peck, South Norwalk assigned whatever claim(s) it had against Public Service to Peck in exchange for one dollar and a covenant contained in a subsequent letter from Peck not to pursue any claims against South Norwalk for any judgment not covered by insurance and to limit her recovery to the available insurance proceeds.

VII. Proceedings in the District Court

In May 1999, Peck sued Public Service as assignee and subrogee of South Norwalk in the District Court under Connecticut's direct action statute, Conn. Gen. Stat. § 38a-321.[7] The Complaint was amended on April 5, 2000, and alleged that Public Service (1) breached its insurance contract with South Norwalk; (2) breached the implied covenant of good faith in that contract; (3) violated the Connecticut Unfair Insurance Practices Act, id. §§ 38a-815 et seq.; (4) violated Connecticut's Unfair Trade Practices Act, id. §§ 42-110b et seq.; and (5) breached its duty to Peck, who was alleged to be a third-party beneficiary of the insurance contract. In June 2001, Public Service moved for summary judgment on the grounds that (1) South Norwalk failed to provide timely notice of the claim, (2) there was no coverage due to the fact that the underlying action was filed

before the policy's effective date, and (3) there was no coverage due to the fact that the injuries alleged by Peck were not covered by the policy.

In a November 11, 2001 unpublished decision and order, the District Court granted summary judgment for Public Service solely on the late notice defense. Applying Connecticut law, the District Court interpreted the notice language in the insurance policy as meaning "within a reasonable period of time under the circumstances of the case." The District Court then proceeded to examine the evidence regarding timeliness of the notice, commenting that it was "uncontested that [South Norwalk] did not comply with the policy requirement that it provide [Public Service] with notice of the suit as soon as practicable nor did it send copies of the legal papers to its insurer." Indeed, South Norwalk "never specifically asked for representation or a defense, apparently believing that, because the suit had begun before the policy went into effect, there would be no coverage." Instead, the District Court observed, South Norwalk undertook its own defense, which the District Court characterized as, if not a sham, an absolute disaster."

The District Court then concluded that Peck had failed to satisfy her burden under Connecticut law of showing that Public Service was not materially prejudiced by South Norwalk's failure to give timely notice of the underlying action. According to the District Court, it was "hard to imagine any greater prejudice to [Public Service] than a demand for payment of a default judgment of which it was totally ignorant and as to which, through [South Norwalk's] failure to comply with the terms of the contract, [Public Service] has been deprived of its right to defend." Indeed, because South Norwalk failed to cure the default and defend on the

merits, the District Court opined that an argument could be made that South Norwalk "was colluding with [Peck] since ultimately it was assured that neither it nor its general partners would be subject to any claim." Accordingly, summary judgment was granted without reaching the other arguments advanced by Public Service.

Peck subsequently moved for reconsideration of the District Court's decision and for relief from the judgment, arguing, inter alia, that by failing to send a letter to South Norwalk rejecting coverage or reserving its rights, Public Service had waived its late notice defense. The District Court denied the motions in another unpublished decision. This timely appeal followed.

DISCUSSION

I. Standard of Review

We review de novo the District Court's grant of summary judgment and construe the evidence in the light most favorable to Peck. See McCarthy v. Am. Int'l Group, 283 F.3d 121, 123 (2d Cir. 2002). Summary judgment here would have been "appropriate if there [were] no genuine issues of material fact" and Public Service had been "entitled to judgment as a matter of law." Id. at 123-24 (citing Fed. R. Civ. P. 56(c)). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict" for Public Service. See id. at 124 (internal quotation marks omitted). Thus, with respect to the issue of whether Public Service was materially prejudiced, if there were "any evidence in the record from which a reasonable inference could be drawn in favor of [Peck], summary judgment [would be] improper." See id. (internal

quotation marks omitted). To this end, Public Service bore the burden of "demonstrat[ing] the absence of any genuine factual dispute." See id. And, to survive summary judgment, Peck had to "come forward with specific facts showing that there [was] a genuine issue for trial" on the issue of material prejudice. See id. (internal quotations marks omitted). We think that she has done so.

II. Connecticut Law Governing Timely Notice and Prejudice

In Aetna Casualty & Surety Co. v. Murphy, 538 A.2d 219 (Conn. 1988), the Connecticut Supreme Court articulated the legal analysis to be applied in a duty to defend case when an insurer raises the defense that its insured failed to comply with the policy's requirement that it provide the insurer with timely notice of a claim. There, the court held that, "[i]f it can be shown that the insurer suffered no material prejudice from the delay, the nonoccurrence of the condition of timely notice may be excused because it is not ... a material part of the agreed exchange." Id. at 223 (internal quotations omitted). Furthermore, because the insured "is seeking to be excused from the consequences of a contract provision with which [it] has concededly failed to comply," the "burden of establishing lack of prejudice must be borne by the insured," and "the existence or nonexistence of prejudice from delayed notice should be determined on a factual basis." Id. at 224.

The rationales underlying this rebuttable presumption that prejudice follows from untimely notice are that the purpose of the notice provision "'is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances'" and that, "'if the insurer is thus given the opportunity for a timely investigation,

reasonable compromises and settlements may be made, thereby avoiding prolonged and unnecessary litigation.'" Id. at 223 (quoting 8 J. Appleman, Insurance Law and Practice § 4731, at 2-S (rev. ed. 1981)). This "legitimate purpose of guaranteeing [an insurer] a fair opportunity to investigate accidents and claims can be protected without the forfeiture that results from presuming, irrebuttably, that late notice invariably prejudices the insurer." Id. at 222.

According to Connecticut law, determining whether untimely notice is prejudicial "requires a factual inquiry into ... the circumstances" surrounding each case in order to strike "a proper balance between the interests of the insurer and the insured." Id. at 223. However, Connecticut's courts have not provided specific guidance on what constitutes "material prejudice" in an untimely notice case.

III. Whether There Were Genuine Issues of Material Facts Concerning Notice to, and Material Prejudice Suffered by, Public Service?

Here, the District Court's conclusion that Peck failed as a matter of law to meet her burden to demonstrate that Public Service was materially prejudiced was based on the findings that Public Service was subjected to a "demand for payment of a default judgment of which it was totally ignorant" and that "Public Service ha[d] been deprived of its right to defend." Our review of the evidence presented on the motion for summary judgment leads us to conclude that whether Public Service was "ignorant" of the case giving rise to the default judgment and thus whether it was completely "deprived of its right to defend" present unresolved questions of fact.

There are factual disputes concerning what Public Service knew about Peck's underlying tort action and when it knew it. Whereas the default judgment was not requested until November 1996 and was not granted until July 1997, Public Service received notice of the action against South Norwalk through Rattlesnake's counsel in September 1995, eight months after the policy was purchased (the earliest point at which notice could have been given) but almost two years before the default was entered. Whether notice from South Norwalk's coinsured/codefendant can serve as notice from South Norwalk, and thus whether the prejudice to Public Service should be measured only by the events prior to September 1995, present unresolved questions of Connecticut law and questions of fact, both of which should be addressed by the District Court in the first instance. For example, some jurisdictions have held that notice provided by one codefendant/coinsured is sufficient to satisfy the contractual notice obligation of another codefendant/coinsured only if the insurer receives actual notice that the other codefendant/coinsured was served with process. See Campbell v. Cont'l Cas. Co., 170 F.2d 669, 671 (8th Cir. 1948) (applying Missouri law and stating that "neither the language of the policy, nor the construction made by any court of such provisions as it contains, has imposed on the insurer, merely because it knows that an insured has been named as a defendant in an action, the sentry duty of tracking back and forth to the court house to keep a check on if or when he may be served with process."); see also Indem. Ins. Co. v. Forrest, 44 F.2d 465, 466 (9th Cir. 1930); 14 Couch on Insurance § § 199:97 (2002) (Westlaw online). Although the September 1995 notice was provided in the form of a summons naming South Norwalk as a defendant, the record before us does not reveal whether Public Service received notice that South Norwalk was served with process.

Furthermore, presuming the September 1995 notice is valid as to South Norwalk, it is uncertain whether the Revised Complaint Public Service received could serve as notice of conduct for which Public Service could be liable during the coverage period running from December 1994 to December 1995. The Revised Complaint alleged personal and property damages sustained "on an ongoing, regular basis since October 1992 "; it was filed, however, in August 1994 before the policy period commenced. Whether the allegations in this complaint, combined with other information in the possession of Public Service, may serve as notice of conduct occurring after the complaint was filed presents both an unresolved question of Connecticut law and questions of fact that should be addressed by the District Court in the first instance, if necessary. Because of these same issues of timing, it is also unclear whether the default judgment, which was entered only on the basis of the Revised Complaint, could legally make Public Service liable for any occurrences during the policy period.

Additional evidence also suggests that Public Service was not ignorant of South Norwalk's involvement in the lawsuit, including Jaconetti's notations in the case file, Blecher's request from Rattlesnake's attorney for additional information regarding South Norwalk, and Public Service's receipt of the lease agreement requiring Rattlesnake to procure insurance and name South Norwalk as an additional insured. Under Connecticut law, the burden lies on Peck to demonstrate Public Service's lack of prejudice. However, at this point there is no evidence in the record that Public Service would have acted differently from September 1995 forward if it had received the notice directly from South Norwalk, given the reasons Public Service gave for disclaiming

coverage in its November 1995 communication with Rattlesnake.

Our holding on the prejudice issue is limited. We hold only that the District Court erred in deciding as a matter of law that Public Service did not have sufficient notice of Peck's claims against South Norwalk at any point prior to the entry of the default judgment based on the record before it; we express no opinion whether Public Service may on remand show prejudice on a more developed record or on the current record based on a different theory, such as prejudice derived from the events prior to September 1995, provided the theory has not already been waived in the District Court. Likewise, because the District Court declined to reach the contentions other than notice and prejudice advanced by Public Service in support of its motion for summary judgment, we express no opinion on them and remand them to the District Court.

CONCLUSION

For the foregoing reasons, we vacate the summary judgment entered by the District Court and remand the case for further proceedings consistent with this opinion.

FOOTNOTES

[1] There is no indication that this Peck, a member of the firm acting on behalf of Rattlesnake and Opper, had any relationship to the plaintiff Peck in the underlying action.

[2] Peck's motion to lift the automatic stay of her tort action against South Norwalk was granted on February

9, 1996, after several prior attempts to lift the stay had failed.

[3] In addition to the insurance purchased from Public Service, Rattlesnake also purchased insurance policies from Greater New York Mutual Insurance Company and the Aetna insurance company, naming only itself as insured.

[4] The Amended Complaint also may have been filed to bring the alleged misconduct of South Norwalk within the period that South Norwalk was covered by the Public Service policy. The allegations made clear that Peck sustained injuries "on an ongoing, regular basis since October 1992," i.e., up to and including the filing date of the Amended Complaint.

[5] Indeed, an examination of the Bankruptcy Court's docket reveals not only that there had been no discharge, but also that the bankruptcy petition had been voluntarily dismissed in May of 1997 - two months before the default judgment against South Norwalk was entered.

[6] It is not clear from the record (1) why there was a $25,000 discrepancy between the damages assessed against Rattlesnake and South Norwalk; and (2) whether these damages were cumulative so that any sums paid by Rattlesnake would also satisfy South Norwalk's judgment or whether they were "independent" damages.

[7] Greater New York Mutual Insurance Company also was named as a defendant in this lawsuit but was dismissed by stipulation on April 4, 2000.

DECISION 3:99 CV 886 (GLG)

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

ELLEN M. PECK,
Plaintiff,

-against-

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,
Defendant.

NOV 21, 2001

The defendant has moved for summary judgment [Doe. #81] in this action, brought by plaintiff, a subrogee, judgment creditor, and assignee of a company insured at one time by the defendant. The defendant has filed a Local Rule 9(c)1 Statement of Undisputed Material Facts in Support of its Motion. Since plaintiff has not filed the required opposition statement, the defendant's statement of facts must be accepted.[1] See D. Conn. L. Civ. R. 9(c)1.

The Facts

The following facts are taken almost verbatim from the defendant's Statement of Undisputed Material Facts:

1. On January 10, 1995, Public Service Mutual Insurance Company ("Public Service Mutual") issued a policy naming South Norwalk Redevelopment Limited Partnership ("South Norwalk Redevelopment") as an additional insured. The policy defined the policy period as "12/01/94 to 12/01/95 12:01 A.M. at the Insured's

mailing address," and, thus, went into effect until December 1, 1994.[2]

2. The policy issued by Public Service Mutual clearly stated:

This insurance applies to "bodily injury" or "property damage" only if: . . . The "bodily injury" or "property damage" occurs during the policy period.

3. On June 23, 1994, several months before the policy went into effect, the plaintiff initiated a lawsuit in Connecticut Superior Court against South Norwalk Redevelopment alleging damages as a result of excessive noise in a restaurant owned by South Norwalk Redevelopment and operated by its tenant.

4. Defendant South Norwalk Redevelopment never notified Public Service Mutual of the suit. It never sent the suit papers to Public Service Mutual. It never requested coverage under its policy.

5. South Norwalk Redevelopment authorized Attorney Paul McCullough to enter an appearance on its behalf. However, rather than McCullough representing the interests of South Norwalk Redevelopment, the following events occurred:

i. South Norwalk Redevelopment was defaulted for failing to respond to discovery.

ii. Even though its attorney recognized that the default could be vacated merely by filing the requested response, he refused to do so, leaving the default in place.

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iii. At the July 21, 1998 pretrial conference, Attorney McCullough took no steps to defend South Norwalk Redevelopment. Instead he represented to the court that:

(1) South Norwalk Redevelopment's liability had been discharged in a Chapter 7 bankruptcy. This representation was completely false. Attorney McCullough later admitted in an affidavit that the representation was false.

(2) He also stated that the plaintiff's claim was covered by insurance, ignoring the fact that South Norwalk Redevelopment had given no notice to the insurance company and had requested no defense, either from public Service Mutual or from any other insurance company.

(3) Instead of defending, South Norwalk Redevelopment asked that it be excused from participating at the trial, stating that South Norwalk Redevelopment would "take no position" in the case.

iv. Superior Court Judge Mintz responded with a direct order to Attorney McCullough. In clear and unmistakable terms, the Superior Court explicitly ordered Attorney McCullough to notify the insurance company, stating that "[i]t is up to you and your client to notify the insurance company" Despite the clarity of this unequivocal order, Attorney McCullough admitted in an affidavit that, in violation of the court's order, he never notified Public Service Mutual or any other carrier.

6. South Norwalk Redevelopment undertook its own defense and then allowed a default judgment to be taken against it.

7. The State Court complaint alleged only that the plaintiff suffered:

a. Regular loss of sleep;

b. Needless anxiety and severe emotional distress;

c. Regular deprivation of her rightful enjoyment to the peace, quiet and enjoyment of her home; and

d. Severe impairment to and diminution in the value of her dwelling place.

8. The policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person. . . ."

9. The policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property."[3]

10. The complaint does not allege physical harm to tangible property.

Additional Facts

The foregoing facts hardly flesh out the background of this litigation. There are numerous other facts that appear to be undisputed, which must be understood in order to deal with the issues presented by defendant's summary judgment motion.

On May 12, 1992, South Norwalk Redevelopment, as landlord, executed a lease with Rattlesnake Ventures, Inc. (hereinafter "Rattlesnake"), as tenant, for the rental of certain premises in South Norwalk, Connecticut, to be used by Rattlesnake for a restaurant, bar and grill, known as the Rattlesnake Bar & Grill.

The lease required Rattlesnake to obtain insurance not only for its benefit but also to protect the landlord and to deposit the policy with South Norwalk Redevelopment.

In January 1995, Public Service Mutual issued a commercial insurance policy to Rattlesnake, insuring Rattlesnake as the named insured and South Norwalk Redevelopment as an additional insured. ate Policy No. 00-74-319159. Prior thereto, it does not appear that South Norwalk Redevelopment had been named as an additional insured on any policy issued to Rattlesnake. Public Service Mutual's policy provided, inter alia, comprehensive general liability coverage for bodily injury or property damage that "occur[ed] during the policy period."

In June 1994, plaintiff, a tenant who lived in a condominium above the restaurant, filed a complaint in Connecticut Superior Court, complaining of excessive noise and vibrations from the bands that played at the Rattlesnake Bar & Grill. The complaint contained eleven counts. The first four counts were directed against Rattlesnake claiming negligence per se, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of Connecticut's Unfair Trade Practices Act. The next four counts made similar allegations against William Opper, President, permittee, and manager of Rattlesnake. The last three counts were directed against South Norwalk Redevelopment, as landlord, for purportedly allowing Rattlesnake to operate a noisy restaurant. They were similar to the four counts asserted against Rattlesnake except that there was no count for intentional infliction of emotional distress. The causes of action against South Norwalk Redevelopment claimed that the plaintiff suffered

injuries "on an ongoing, regular basis since October 1992." (Compl. at 12, 14-15.)

Plaintiff maintains that the wording of the complaint made it apparent that she sought damages not only for the intervening two years, but was seeking damages for the future.[4] The word "since" makes it apparent that the damages sought were those that had already occurred. The plaintiff did, however, seek injunctive relief that would have affected future injuries.

At the time plaintiff's complaint was filed, there was no insurance covering the landlord, although Rattlesnake did have a policy or policies insuring itself and was represented by an attorney hired by its insurers, Travelers and the Insurance Company of Greater New York. In fact, at the time suit was commenced, not only was South Norwalk Redevelopment not covered by any insurance policy, it had filed for bankruptcy under Chapter 11 in the Bankruptcy Court for the District of Connecticut. In January 1995, the plaintiff moved for relief from the automatic bankruptcy stay, but her motion was denied. We assume that thereafter such a motion may have been granted although the actions and testimony of Attorney Paul McCullough, referred to hereafter, leave that aspect somewhat unclear.

In the then-continuing state court litigation, the firm of Gildea & Stevens appeared for Rattlesnake and William Opper only. At that point in time, the plaintiff was litigating only against those parties and, indeed, had made an offer of judgment to them.

In September 1995, a broker put Public Service Mutual on notice of the claim against Rattlesnake (the primary insured on the policy) and asked that Public Service Mutual communicate with Attorney Gene Cederbaum.

Attorney Cedarbaum had been representing Rattlesnake at that time, we gather, as their private attorney, and had not been retained by their insurers, Travelers and the Insurance Company of Greater New York. No request was made at that time for Public Service Mutual to provide a defense for South Norwalk Redevelopment, and no notice of the suit was given by South Norwalk Redevelopment to Public Service Mutual.

In November 1995, Public Service Mutual sent to Rattlesnake a notice of disclaimer of coverage. The notice indicated that the loss preceded Rattlesnake's insurance policy by some two years, and that since the claims occurred prior to the inception of the policy, no coverage could be afforded. The notice further stated that

[i]f for some reason[ ] it is determined that this loss does fall within your Public Service Mutual policy period, our files indicate that you were aware of this loss as early as October, 1992, and that you were served with the original summons and complaint in July, 1994. Our first notice of this loss was via legal papers forwarded to Public Service Mutual in September, 1995. Your failure to timely notify Public Service Mutual and your late notice of same is in direct violation of your policy of insurance.

(Def.'s Evidence Submitted in Support of Mot. for Summ. J. Ex. 9.) The letter also listed several other grounds on which Public Service Mutual believed its policy would not cover the previously filed lawsuit. It concluded by strongly suggesting that Rattlesnake maintain legal counsel at its own expense (which suggests that Public Service Mutual was unaware that Rattlesnake had earlier insurance policies which were providing a defense).

The status of South Norwalk Redevelopment during 1995, 1996 and 1997 is unclear. However, we do know that by July 1998, Attorney Paul McCullough appeared and represented South Norwalk Redevelopment.

In November 1996, the plaintiff moved for a default against South Norwalk Redevelopment for failing to provide discovery. South Norwalk Redevelopment had not responded to plaintiff's discovery requests, and a default was entered against it at that time. Neither Attorney McCullough, after he entered an appearance for South Norwalk Redevelopment in July 1998, nor anyone else ever took any steps to open this default. (The default had been entered twelve months before the case came up for trial.)

On June 1, 1998, the plaintiff filed an amended complaint. Plaintiff's counsel maintains that this was the "operative" complaint and that it carried forward the damage claim from 1994 until June 1998. During part of that period, plaintiff's counsel argues, Public Service Mutual's policy was in force. That may be, but as noted earlier, South Norwalk Redevelopment was already in default. The amended complaint, as it pertains to South Norwalk Redevelopment, was similar, if not identical, to the earlier complaints. Moreover, no one, up to that point, had represented South Norwalk Redevelopment or notified Public Service Mutual that South Norwalk Redevelopment had been sued or was claiming coverage under its policy.

The following month, however, Attorney McCullough did appear for South Norwalk Redevelopment. McCullough had negotiated the lease between Rattlesnake and South Norwalk Redevelopment, representing South Norwalk Redevelopment, as the landlord. He was never retained by Public Service

Mutual. Apparently unaware of the fact that South Norwalk Redevelopment had been named as an additional insured under Rattlesnake's policy, he gave no notice to Public Service Mutual. Presumably, his belief that he need not take further action was bolstered by his mistaken understanding that the claim had been discharged in bankruptcy. McCullough admits the misstatements he made to the State Court, including his claiming that the loss would have been discharged in bankruptcy, when in fact, at some point, the bankruptcy petition was withdrawn without any discharge. He testified that, by 1998, South Norwalk Redevelopment no longer owned the property. As to the existence of insurance, McCullough told the Court that "there may well be" insurance and that he would have information very shortly on that subject. This led to the Court's direction to him to notify the anonymous insurance company. He did not do so. McCullough asked to be excused from jury selection and participation in the trial. He was aware that plaintiff's counsel would go forward with a hearing on damages based on the earlier default. Nevertheless, he asked not to be present, and made no attempt to have the earlier discovery default vacated. However, the attorney for Rattlesnake, Brian N. Gildea, having heard the colloquia between the judge and Attorney McCullough, notified Public Service mutual that the case was scheduled to commence trial and that its attorney had requested permission not to attend the trial. Public Service Mutual refused to enter the matter at that late time. (It is unclear whether he informed Public Service Mutual that South Norwalk Redevelopment had been in default for a year prior to the case having been called for trial.)

The trial went forward, and the plaintiff obtained a judgment against Rattlesnake and its manager, William Opper, for $225,000. On the default, the jury entered

damages in the amount of $250,000 against South Norwalk Redevelopment. We do not understand the difference in the two verdicts, nor do we know whether these damages were cumulative so that anything paid by Rattlesnake would also satisfy South Norwalk Redevelopment's judgment, or whether they were independent damages.

It is clear that up to this point Public Service Mutual had not been put on notice that it was being asked to defend and/or indemnify its insured South Norwalk Redevelopment for the claims tried. The plaintiff argues that there was still time for the defendant to become involved in the underlying case prior to trial and to learn of the existence of an amended complaint, and presumably to move to set aside the default that had been entered against it. This, of course, would require complying with the earlier discovery requests that had been ignored. The plaintiff argues that "the defendant knew or should have known about the amended complaint, but decided to ignore the entire matter in the hope that it would never be pursued." (Pl.'s Mem. in opposition at 7.)

Plaintiff also argues that Public Service Mutual has never disclaimed coverage for the claim by sending a letter denying coverage to South Norwalk Redevelopment. That is true, but it is also true that South Norwalk Redevelopment never requested that Public Service Mutual provide it with coverage or a defense. Plaintiff also argues that Public Service Mutual was aware of the suit against Rattlesnake, the named insured on the policy, but refused to represent it. On this basis, plaintiff argues, that there was no possibility that Public Service Mutual would later agree to appear for South Norwalk Redevelopment. We do not think that necessarily follows. Rattlesnake was being represented

all along by an attorney hired by its insurer under the policy in effect when the action was commenced.

Plaintiff also attempts to justify Attorney McCullough's defaults by saying that he refused to participate in the trial because no one would pay his fees. There is no indication that as of the time of trial, he had requested Public Service Mutual to pay his fees. As a result, McCullough allowed a default judgment to be taken against South Norwalk Redevelopment in the amount of $250,000 under the mistaken belief that South Norwalk Redevelopment would have no responsibility for it.

After a verdict was obtained, however, South Norwalk Redevelopment assigned to plaintiff its claims against Public Service Mutual. The assignment is dated September 15, 1999, and states "the intent of this assignment is to provide Ellen M. Peck with all of the rights South Norwalk Redevelopment has pursuant to the aforementioned lease agreements to look to Rattlesnake Ventures, Inc., William Opper, [and other company officers] to satisfy the judgment against South Norwalk Redevelopment in connection with the civil action." Also included in this assignment is the right to sue any insurer who fails to satisfy the aforementioned judgment in full. "[I]n the event any insurer breaches its obligations to satisfy the judgment, South Norwalk Redevelopment also assigns to Ellen M. Peck any and all rights South Norwalk Redevelopment has to pursue legal action against an insurer including, but not limited to claims for breach of contract, breaches of duty to act in good faith. . . " The only consideration stated for this assignment is the usual $1.00.

We believe that South Norwalk Redevelopment was judgmentproof at the time the assignment was made. However, in a separate letter dated June 1, 2000,

plaintiff's counsel covenanted not to pursue South Norwalk Redevelopment for any judgment not covered by insurance and to limit her recovery to the available insurance proceeds.

The Law

Connecticut General Statutes § 38a-321 provides in pertinent
part:

Each insurance company which issues a policy to any person, firm or corporation, insuring against loss or damage on account of the bodily injury or ... damage to the property of any person, for which loss or damage such person, firm or corporation is legally responsible, shall, whenever a loss occurs under such policy, become absolutely liable, and the payment of such loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss [or] damage . . . occasioned by such casualty.

Conn. Gen. Stat. § 38a-321 (formerly codified as § 38-175). The statute also provides that when a final judgment is entered against the insured party for loss or damage covered by the policy, and the judgment remains unsatisfied for more than thirty days:

[the] judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment.

Id.; see Home Ins. Co. v. Aetna Life and Cas. Co., 235 Conn. 185, 198 (1995); Brown v Employer's Reinsurance Corp., 206 Conn, 668, 673 (1988). Thus, plaintiff may

assert any claim that South Norwalk Redevelopment itself could have raised had South Norwalk Redevelopment brought suit against Public Service Mutual; likewise, Public Service Mutual may assert any defense against plaintiff that it could have asserted against South Norwalk Redevelopment had South Norwalk Redevelopment brought suit against Public Service Mutual. See Peck v. Public Service Mutual Ins. Co., 114 F. Supp. 2d 51, 54-55 (D. Conn. 2000).

The defendant asserts several defenses in support of its motion for summary judgment. It notes that its coverage commenced after the underlying action was filed and long after the torts complained of first took place. This is undoubtedly true; however, the plaintiff argues that by filing an amended complaint as the case was going to trial, she brought her damages forward into the period when the policy was in effect. At a minimum, it is clear that Public Service Mutual's coverage did not include the plaintiff's entire claim.

Defendant also argues that there was no coverage under the policy since plaintiff's claims, as alleged in her complaint, were not for "bodily injury" or "property damage," as those terms are defined by its policy. It is a close question whether some of the allegations of the complaint might fall within the policy's coverage, if the policy was in effect at that time and if the insurer had an obligation to defend. It does appear that certain of the claims do not fall within the policy's coverage, but it is impossible to tell on which of the several claims the plaintiff obtained judgment against South Norwalk Redevelopment.

Defendant's most persuasive argument concerns the fact that South Norwalk Redevelopment never notified it of any suit nor requested coverage or a defense of the

claims against it, nor forwarded suit papers to Public Service Mutual. The insurance contract imposed a duty upon South Norwalk Redevelopment to notify Public Service Mutual "as soon as practicable" of any occurrence that might result in a claim or of any claim or suit, and to "immediately" send copies of any demands, notices, summonses or legal papers received in connection with a claim or a lawsuit. Policy No. 00-74-319169, Form CG 00 01 93, at 8, § IV, 2(c). The requirements that notice be given immediately, or as soon practicable, means within a reasonable period of time under the circumstances of the case. West Haven y. United States Fid. & Guar. Co., 174 Conn. 392, 397 (1978) (holding that, under the circumstances, a four-month delay in notifying the insurer of the accident and suit was neither excusable nor reasonable). It is uncontested that South Norwalk Redevelopment did not comply with the policy requirement that it provide Public Service Mutual with notice of the suit as soon as practicable nor did it send copies of the legal papers to its insurer. Indeed, it never specifically asked for representation or a defense, apparently believing that, because the suit had begun before the policy went into effect, there would be no coverage.

Instead, South Norwalk Redevelopment had its own counsel appearing. As noted earlier, Attorney McCullough's representation was, if not a sham, an absolute disaster. He allowed a default to be taken against South Norwalk Redevelopment and did not even attempt to open the default judgment against his client. Moreover, he misrepresented to the Court that there had been a discharge in bankruptcy and that because there may have been insurance, South Norwalk Redevelopment was not concerned about the default. He even failed to notify or locate any insurance company when directed by the Court to do so.

McCullough did not appear at trial to represent South Norwalk Redevelopment, but rather appeared as a witness for the plaintiff. His testimony was directed to the plaintiff's case against Rattlesnake. Rattlesnake's counsel noted that his testimony amounted to testimony on behalf of South Norwalk Redevelopment, which could not testify because it had been defaulted.[5]

Plaintiff argues that the defense of lack of notice is ineffective since the defendant was not prejudiced by this fact and that the defense of lack of notice can be defeated by showing justifiable cause for failing to give notice. The plaintiff's claim had occurred for years prior to the insurance policy going into effect and proceeded for many years thereafter, and plaintiff has provided the court with no evidence of justifiable cause for failing to give the required notice. Such failure can be fatal to the insured's claim for coverage. Aetna Cas. & Surety Co. v. Murphy, 206 Conn. 409 (1988) (holding that an insured's failure to give prompt notice of an insurable claim as required by the policy relieves the insurer of liability unless the insured can show that the delayed notice resulted in no material prejudice to the insurer). While the insurer must show that it has been prejudiced by the delay in giving notice, "the burden of establishing lack of prejudice is on the insured," or its subrogee. Id. at 419. Plaintiff has not met that burden.

Indeed, it is hard to imagine any greater prejudice to Public Service Mutual than a demand for payment of a default judgment of which it was totally ignorant and as to which, through South Norwalk Redevelopment's failure to comply with the terms of the contract, Public Service Mutual has been deprived of its right to defend. See Wagner v. General Accident Ins. Co. of America, No. CV 9454899S, 1997 WL 41216, at *2 (Conn. Super. Ct. Jan. 27, 1997). It is even harder to imagine a case with

more prejudice and fewer justifications for the proceedings by the private attorney for South Norwalk Redevelopment (McCullough). He not only gave away the case, but he did not even attempt to defend on the matter of damages. In fact, the actions of South Norwalk Redevelopment and its private counsel are such that an argument could be made that south Norwalk Redevelopment was colluding with the plaintiff since ultimately it was assured that neither it nor its general partners would be subject to any claim.

Consequently, we conclude that the defendant is entitled to summary judgment on this issue. Having so concluded, we need not resolve the question of whether any of plaintiff's damages occurred during the policy period (although we are most unimpressed by the plaintiffs argument that filing an amended complaint on the eve of trial, after a default had been taken, extends her damage claims into the policy period), or the issue of whether the damages alleged would have been covered by the policy.

Conclusion

Accordingly, the Court GRANTS the defendant's Motion for Summary Judgment [Doe. # 81]. The Clerk will enter judgment for the defendant.

SO ORDERED.

Dated: November 11, 2001
Waterbury, Connecticut.

Gerard L. Goettel
United States District Judge

FOOTNOTES

[1] Exceptions to this are Statements of Fact Nos. 3, 6, 11, and 15, which are conclusions of law and not statements of fact, and Statement of Fact No. 14, which is contradicted at least to a certain degree by the prayer for relief in plaintiff's State Court complaint.

[2] Additionally, the endorsement adding South Norwalk Redevelopment as an additional insured provided that it was effective 12-01-94. Policy No. 00-74-319169, Endorsement No. 2.

[3] The policy also defines "property damage" as "[l]oss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." Form CG 00 01 10 93, at 12, ¶15(b).

[4] A revised complaint was issued two months later which included a previously omitted page but added no new causes of action.

[5] His testimony concerned, inter alia, efforts to add insulation to the building which would have limited the amount of noise coming from the restaurant and bar. This testimony was given on July 31, 1998, the last day of trial.

Dkt No: 01-9459

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ellen M. Peck,
Plaintiff-Appellant,

v.

Public Service Mutual Insurance Co.,
Defendant-Appellee,

Greater New York Mutual Insurance Co.,
Defendant.

JUNE 13 2003

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Public Service.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing an bans has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:
Arthur M. Heller,
Motions Staff Attorney

Civil Action 3:99-CV-886(GLG)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ELLEN M. PECK

v.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY

June 28, 2001

Excerpts from:
MOTION FOR SUMMARY JUDGMENT, and DEFENDANT'S LOCAL RULE 9(c)1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Procedure, Public Service Mutual Insurance Company moves for summary judgment. ...

The defendant moves for summary judgment, because the evidence is uniform, uncontroverted and overwhelming in that:

The insured did not notify PSM of the plaintiff's claim, nor did it send the defendant copies of the suit papers served upon it. ...

In support of this motion, the defendant submits exhibits in support of this motion for summary judgment, a supporting memorandum and a Local Rule 9(c)1 statement of undisputed material facts.

Defendant

By:
Oliver B. Dickins, ct15648
One Phelps Lane
Simsbury, Connecticut 06070
(860) 658-4100
One of Its Attorneys

DEFENDANT'S LOCAL RULE 9(c)1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Public Service Mutual Insurance Company ("PSM") respectfully submits this statement of undisputed material facts in support of its motion for summary judgment on all claims filed herewith. ...

In the event of a delayed notice, the burden is on the plaintiff to show that the insurance company was not prejudiced by the delay. Murphy v. Aetna Cas. & Surety Co., 206 Conn. 409, 538, A.2d 219 (1988). Because the plaintiff cannot show that the delay was not prejudicial, the plaintiff cannot recover. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). ...

Based on the foregoing facts the defendant is entitled to summary judgment, as set forth in the attached motion and supporting memorandum, submitted herewith.

Defendant

By:
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(860) 658-4100
One of Its Attorneys

CIVIL 3:99-CV-886(GLG)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

ELLEN M. PECK.
Plaintiff

VS.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY
Defendant

JULY 16, 2001

Excerpts from:
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Page 8:

(ii) Lack of Notice

The defendant argues that it is entitled to summary judgment because SNRLP never provided notice of the underlying action. This arguments must fail to for three different reasons. ... Second, a complete copy of the summons and complaint was admittedly received by the defendant from SNRLP's insurance agent in 1995. ...

Page 11:

Even if the defendant is permitted to raise the lack of notice defense, this would not be dispositive of the case. The plaintiff would still be permitted to offer evidence that the defendant was not prejudiced by the alleged lack of Page 12: notice. The defendant may also defeat lack of notice by showing justifiable excuse on the part of SNRLP. Thus the defendant is not entitled to summary judgment on this issue.

Page 19:

III. Conclusion:

For all the reasons stated and discussed herein, the plaintiff objects to the defend-
ant's motion for summary judgment, and asks that the motion be denied by the court. ...

THE PLAINTIFF

By: JOHN W. MILLS, ESQ.
Murphy and Karpie, LLC
350 Fairfield Avenue
Bridgeport, CT 06604
Federal Bar No.; ct11706
(203) 333-0177

BEST AVAILABLE COPY

Excerpts from:
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CIVIL 3:99-CV-886(GLG)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

ELLEN M. PECK.
Plaintiff

VS.

PUBLIC SERVICE MUTUAL INSURANCE COMPANY
Defendant

JULY 16, 2001

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Page 8:

(ii) Lack of Notice

The defendant argues that it is entitled to summary judgment because SNRLP never provided notice of the underlying action. This arguments must fail to for three different reasons. ... Second, a complete copy of the summons and complaint was admittedly received by the defendant from SNRLP's insurance agent in 1995. ...

Instead of contesting insurance coverage, South Norwalk took a different path: it chose to hire its own attorney, and entered into its own defense. Ultimately, however, this defense failed. Apparently, because of a "mistaken understanding of the facts," the attorney chosen by South Norwalk allowed the case to go into default.

Years later the plaintiff informed Public Service that she had taken judgment against the defendants, that South Norwalk had assigned its rights to her, and that she was entitled to be paid under the South Norwalk's policy. This action ensued.

After several years' proceedings in the district court, Public Service moved for summary judgment on several grounds, including: (1) late notice; (2) the claim occurred before the coverage began; (3) no coverage under the policy; (4) that, South Norwalk had breached the insurance contract by assuming its own defense, and allowing a default judgment to be taken against it. Without reaching the other issues, the district court granted the defendant's motion for summary judgment basing its summary dismissal on a single ground: late notice.

The question is whether summary judgment on that issue was appropriate. Although the plaintiff filed a memorandum opposing the summary judgment motion, she failed to file a specific statement of contested facts, as required by Local Rule 9(c)2. Specifically the plaintiff adduced no proof and provided no affidavits or other proof to show the Public Service was not prejudiced by the late notice of the lawsuit.

United States Court of Appeals For the Second Circuit

01-9459

ELLEN M. PECK,
Plaintiff-Appellant,

-v.-

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

PETITION FOR REHEARING and, PETITION FOR REHARING EN BANC or behalf of PUBLIC SERVICE MUTUAL INSURANCE COMPANY

Pursuant to Rules 35 and 40 to the Federal Rules of Appellate Procedure, defendant-appellee respectfully petitions this court for a rehearing of its opinion of April 17, 2003.

Statement of Conflict with Supreme Court Decision

As Public Service will show more fully in Part 2 of this Petition the Panel Opinion in this case violates and contradicts the express mandate of the United States Supreme Court in Celetex Corp. v. Catrett, 477 U.S. 317 (1986).

Summary of Facts

Even though the facts of his insurance coverage case are not controverted, they are not uncomplicated. This case arises out of a liability claim for excessive noise brought against a restaurant (Rattlesnake Bar & Grill) and its landlord (South Norwalk Redevelopment

Under Connecticut law, tardy notice of an insurance claim is a breach of contract.

"Absent waiver, an unexcused, unreasonable delay in notification constitutes failure of condition that entirely discharges an insurance carrier from any further liability on its insurance contract."

Aetna Cas. & Surety Co. v. Murphy, 206 Conn. 409, 412, 538 A.2d 219, 220 (1988).

Even though the delay in notice is a breach of contract that can discharge the insurance carrier, the Connecticut courts recognize an exception, albeit narrow, whenever necessary to avoid "disproportionate forfeiture." See Aetna Cas. & Surety Co. v. Murphy, supra, 538 A.2d at 221-222.

More specifically, an insured guilty of late notice to the insurance company can still recover only if he affirmatively shows that the late notice was not harmful to the insurance company.

[T]he burden of establishing lack of prejudice must be borne by the insured. It is the insured who is seeking to be excused from the consequences of a contract provision from which he had concededly failed to comply.

Aetna Cas. & Surety Co. v. Murphy, supra, 538 A.2d at 419-420.

Turning to the present case, we see that the plaintiff has wholly failed to meet her burden of proof. Under the presumption of Aetna v. Murphy, prejudice is presumed. It was up to Peck to rebut the possibility of material prejudice. During that 14-month period

between the initiation of suit and the earliest possible notice to Public Service, it is obvious that memories could fade, records could be lost, and witnesses could disappear. Yet, despite the burden, Peck made no attempt (1) to identify the earlier available evidence [1] and show that it still exists; (2) to identify the witness to determine that their memories of the events are still intact.[2]

The record below contains other indications that the delay by the insurance company prejudiced the company's ability to defend the claim. There are several examples:

1. Even though plaintiff was apparently prepared to settle the claim, and had filed an Offer of Judgment on April 12, 1995, see also the Offer of Judgment of April

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[1] Because Public Service's investigators reported that they had difficulty in obtaining a copy of the lease agreement, App. 120, it is reasonable to assume that other documentation would also have become difficult to obtain. Peck made no effort to identify the relevant documents or to show they still exist.

[2] Because the facts in the underlying case were hotly disputed, it seems obvious that the delay precluded Public Service from investigating whether other restaurants also had live band music and whether there was a hazard on the South Norwalk premises. Peck made no effort to show hat this information was still available in September 1995. Cf. *Hartford Ins. Co. v. Colonia Ins. Co.*, 58 Conn. App. 39, 44, 750 A.2d 1158 (2000) (holding hat a delay in notice that precludes investigation is prejudicial).

21, 1997, Peck offered no proof that negotiations or settlement was impossible during the 14-month period.[3]

A parallel lawsuit involving identical claims to the plaintiff's claim, had already been filed and was scheduled for trial on February 6, 1996. (App. 107). The discovery on that case had been concluded without Public Service's participation. Peck made no effort to show that discovery in that case covered the same issues or that it had been preserved.

3. Interface Flooring Systems, Inc. v. Aetna Cas. & Surety Co., 261 Conn. 601, 804 A.2d 201 (2002) (holding that the decision of the insured to employ is own counsel did not excuse the insured's failure to notify the insurer).

Even if an insured explicitly retains the right to employ counsel and to defend itself, it can be a breach of the insurance contract precluding the plaintiff from recovery under the direct action statute, C.G.S. § 38a-321 (formerly codified as C.G.S. § 38-175). The Connecticut Supreme Court has affirmed a decision that the insured breached its contract by allowing the case to go into default. Brown v. Employer's Reinsurance Corp., 206 Conn. 668, 539 A.2d 138 (1988).

Under Aetna v. Murphy, the insured's delay and failure to give notice was presumed to prejudice the

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[3] See *American Home Assurance Corp. v. Republic Ins. Co.*, 984 F.2d 76 (2d Cir.), cert. denied, 508 U.S. 973 (1993) (holding that a 36-day delay unreasonable under New York law, particularly considering that settlement negotiations were being conducted).

insurance company. Although the plaintiff had ample opportunity to show the absence of prejudice, she chose not to contest the issue. She offered no proof. Under Aetna v. Murphy, the summary judgment should have been affirmed.

2. The Plaintiff Had Ample Opportunity to Develop A Factual Basis for Objecting to the Public Service's Motion for Summary Judgment. Under Celotex Corp. v. Catrett, a Remand for Additional Proof Is Inappropriate.

In addition to the State law ground for affirming the judgment below, a strong principle of federal procedure requires affirmance. A central feature of federal procedure is found in Celetex Corp. v. Catrett, 477 U.S. 317 (1986) governing federal summary judgment practice.

In this case the Panel Opinion premised its decision upon the principle that "Public Service bore the burden of demonstrat[ing] the absence of any genuine factual dispute." In fact, the United States Supreme Court had rejected the rule that a party moving for summary judgment bears the burden of proof. The burden of proof was on the party with the burden of proof at trial. In this case, because Peck would have had the burden of proof, the burden of proof was on Peck, not Public Service.

The Celotex case arose out of the widespread asbestos litigation that engulfed the courts in the past two decades. In that case, the plaintiff, the administrator of an industrial worker's estate, brought a wrongful death action contending that the defendant's products were the cause of asbestos-related disease that resulted in Mr. Catrett's death. The defendant moved for summary judgment, contending hat there was

no proof that the plaintiff had ever been exposed to the defendant's products.

The defendant submitted no proof. The plaintiff's affidavits opposing he summary judgment were all inadmissible as hearsay. The district court found that there was no evidence that the plaintiff had been exposed to the defendant's products and granted the motion for judgment dismissing the case. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, finding that, even though no admissible evidence had been tendered by either side. The party moving for summary judgment causes the burden of providing the absence of a genuine issue of fact "even on issues where the other party would have the burden of proof at trial." Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985).

On certiorari, the Supreme Court reversed finding that if there is a "complete failure of proof" on a motion for summary judgment 477 U.S., 317, 323 (1986), the court must rule against he party who will bear the burden of proof of trial.

"... the plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, ..."

In this case, Peck, the nonmoving party, had the burden of showing the absence of prejudice to Public Service resulting from the late notice. She provided no evidence at all to meet this burden. Accordingly, federal procedure "mandates" the entry of summary judgment. 477 U.S. at 322. Any other holding would violate the clear holding of the Supreme Court in Celotex Corp. v. Catrett. Because Supreme Court precedent "mandates"

the entry of summary judgment, the Panel opinion should be withdrawn and the summary dismissed.

The Panel Erred in Instructing the District Court Regarding the Burden of Proof on Remand

Finally, the petitioner is concerned because the Panel Opinion's instructions to the District Court misstate the law. In instructing the lower court, the opinion describes the issue to be decided as "whether Public Service may show prejudice on a more developed record." Opinion at 17.

This instruction implies that burden on remand is on Public Service. In fact, burden on remand would be the same as it was in the initial proceedings, on the plaintiff. The burden is on the plaintiff to show that Public Service was "not materially prejudiced" by the insured's late notice.[4]

Conclusion

For these reasons, Public Service requests that the Panel Opinion be revised:

(1) To impose the burden of proof on the plaintiff to show that the insured's late notice did not

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[4] The Panel Opinion also erred in describing the burden of proof in the initial District Court proceedings. The Opinion stated that in the initial proceedings it was the plaintiff's burden "to demonstrate that Public Service was materially prejudiced." Opinion at 15. Actually, the plaintiff's initial burden was to show that Public Service was "not materially prejudiced."

prejudice Public Service, in accord with the principle set forth in Aetna Cas. & Surety v. Murphy.

(2) To hold that burden in the summary judgment proceeding is not on the moving party, but instead is on the party with the burden of proof at trial, and sustain the District Court summary dismissal in accord with the Supreme Court's "mandate" in Celotex Corp. v. Catrett.

(3) To modify the instructions to the District Court regarding the burden of proof or remand.

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(2)

No. 03-0393

Supreme Court, U.S.
FILED
OCT 10 2003
CLERK

In The

Supreme Court of the United States

PUBLIC SERVICE MUTUAL
INSURANCE COMPANY,

Petitioner,

v.

ELLEN M. PECK,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF IN OPPOSITION FOR RESPONDENT ELLEN M. PECK

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly reversed an order of summary judgment entered against the respondent by the District Court on the basis that there remained unresolved issues of material fact in dispute between the parties concerning whether the petitioner-insurer had been materially prejudiced as a result of allegedly receiving late notice of the respondent's claim in an earlier lawsuit filed in 1994.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Aetna Casualty & Surety Co v. Murphy, 206 Conn. 409, 538 A.2d 219 (1988) 11

Celotex Corp v. Catrett, 477 U.S. 317 (1986) 11

Jenkins v. Indemnity Ins. Co., 152 Conn. 249, 205 A.2d 780 (1964) 11

Kurzatkowski v. Kurzatkowski, 142 Conn. 680, 116 A.2d 906 (1955) 11

STATUTES

Connecticut General Statutes § 38a-321 6

BRIEF IN OPPOSITION FOR RESPONDENT ELLEN M. PECK

Respondent Ellen M. Peck ("Peck") submits that the petition for writ of certiorari filed by Petitioner Public Service Mutual Insurance Company ("PSM") should be denied. The decision below, by the Second Circuit Court of Appeals, correctly reversed the order of summary judgment entered against Peck by the District Court after determining that there remained critical issues of material fact still in dispute concerning when notice of a claim was received by PSM and whether PSM was prejudiced as a result of not receiving notice earlier. Issues of notice and prejudice are fact driven, and should be decided by a jury after hearing all of the evidence. Contrary to the assertions made by the petitioner in the petition now before this Court, Peck did in fact produce specific evidence in opposition to summary judgment, and the Second Circuit Court of Appeals was correct in deciding that she had made a sufficient showing to defeat summary judgment.

The petitioner raises no novel issue of law, and there is no reason for this Court to hear further argument concerning a motion for summary judgment. This case was properly remanded to the District Court for further consideration. The respondent should be provided with her day in court, so that a jury can finally decide all of the issues still in dispute between these parties.

STATEMENT OF THE CASE

This case arises out of a civil lawsuit initially filed by Peck in the Connecticut Superior Court in 1994 as a result of excessive noise coming from the Rattlesnake Bar &

Grill, which moved directly beneath Peck's condominium unit in South Norwalk, Connecticut in 1992 and began to feature live rock music several nights each week. Peck brought suit against the owner of the condominium unit, South Norwalk Redevelopment Limited Partnership ("SNRLP"), as well as Rattlesnake Ventures, Inc. ("Rattlesnake") and its owner, William Opper.

The summons and complaint were filed on or about June 23, 1994, alleging an ongoing course of improper conduct by the defendants, beginning in 1992 and continuing into the future. Five days after the complaint was filed, the law firm of Goldstein & Peck entered an appearance on behalf of all three defendants. Subsequently, on December 6, 1994, Attorney Paul McCullough also appeared solely on behalf of SNRLP.

When Peck first filed suit in 1994, the defendants only provided notice of her claim to the Greater New York Insurance Company and to the Travelers Insurance Company, the two carriers who insured the premises from 1992-1994. However, because the complaint alleged ongoing tortuous conduct by the defendants, it was later necessary to provide additional notice to PSM, whose policy covered the period 12/1/94-12/1/95. On September 8, 1995 Goldstein & Peck, counsel of record for all defendants, requested that insurance agent Ronald Fitelson notify PSM of the underlying action. Four days later, on September 12, 1995, Fitelson faxed to PSM a Loss Notice and the summons and complaint, which separately listed each defendant, and contained individual counts directed against each defendant, so that they were readily distinguishable.

When providing notice of the claim to PSM, Fitelson instructed PSM to contact Attorney Eugene Cederbaum, the lawyer then handling the case at Goldstein & Peck. On September 14, Daniel Jaconetti, the head of litigation at PSM, set up a claim file in which he made handwritten notes about the claims alleged in Peck's complaint. (App. 22a) Jaconetti clearly recognized that separate claims were being asserted by Peck against SNRLP, which was listed as an additional insured on the policy, writing "Possibly may be coverage for Counts Nine and Ten [against SNRLP] Depending upon lease Agr. And if Co-defendant [SNRLP] is Add'l Insd. On Policy."

Mr. Jaconetti immediately directed insurance adjuster Barry Blecher to get a hard copy of the policy and the lease agreement between Rattlesnake and SNRLP. (App. 22a) Mr. Blecher in turn contacted Attorney Cederbaum, who on October 20 confirmed for Blecher that "the premises on which the restaurant is located is rented from South Norwalk." Attorney Cederbaum further advised PSM that Peck's deposition was scheduled to take place on October 26th. (Pet. App. at 30a)

In early November, PSM received a copy of the lease agreement, which specifically required Rattlesnake to maintain liability insurance for SNRLP, and to name SNRLP as an additional insured. PSM clearly recognized that claims were being asserted by Peck against SNRLP and that there might be coverage for the claims asserted against SNRLP in Counts 9 and 10 of her complaint, as evidenced by the initial file notes made by Mr. Jaconetti on September 14, 1995. However, PSM refused to participate in the underlying litigation, and refused to provide any of the defendants with a legal defense.

Although invited to attend Peck's deposition on October 26th, PSM refused to hire defense counsel or even to contribute to the defense costs presently being borne by the Greater New York Insurance Company and the Travelers Insurance Company, who had hired the firm of Gildea & Stevens to appear for the defendants on January 23, 1995. On November 28, 1995 PSM sent a letter to Rattlesnake denying insurance coverage on the grounds that (1) the date of the loss was when the noise first started in October, 1992, prior to the December 1, 1994 effective date of the policy; (2) notice of the claim was not timely provided by Rattlesnake until September 12, 1995; and (3) intentional acts alleged in parts of the complaint were excluded from coverage.

Although PSM had received notice of the claim from the Fitelson Insurance Agency, who procured the coverage on behalf of all defendants, including SNRLP as an additional insured listed on the declarations page of the policy, PSM never sent any disclaimer of coverage to SNRLP, and SNRLP was not referred to in the letter sent to Rattlesnake. (Pet. App. at 30a)

Peck had no way to independently contact PSM in order to discuss the claim, as none of the defendants identified PSM as an insurer in response to discovery requests. Finally, on November 25, 1996, Peck filed a motion for default against SNRLP for failure to answer discovery requests. Although an order of default was entered against SNRLP on July 21, 1997, this was *not* a default judgment. Under Connecticut Rules of Practice an order of default is distinguishable from a default judgment. Peck did not move for judgment against SNRLP until the conclusion of trial in 1998, and the order of default could have easily

been remedied at any time prior to trial by providing the requested discovery.

On May 29, 1998 Attorney Brian Gildea, formerly of the firm Gildea & Stevens, entered a new appearance in the case on behalf of all defendants. At a pretrial conference held in July, 1998 Attorney McCullough advised the court that he would not be attending the trial on behalf of SNRLP, because his participation would be prohibitively expensive for his client, who was supposed to be insured and defended by Rattlesnake in accordance with the terms of the lease agreement. (Pet. App. at 31a) Attorney Gildea explained to the court that he planned on defending only Rattlesnake and Opper, because those were the only insureds listed on the policy issued by the Greater New York Insurance Company, who was paying him to be there. Although the lease agreement required Rattlesnake to make sure that SNRLP was also insured under that policy, the tenant had failed to do so.

At that point in the proceedings the Superior Court judge ordered Attorney McCullough to notify any insurance carrier who did insure SNRLP of the approaching trial date. The judge specifically stated that if the insurer wanted "to come in and ask for a continuance," the court would consider such a request. (Pet. App. at 31a) As the tenant had purchased the insurance policy and paid the premiums, Attorney McCullough did not know who to call in response to the judge's order. Therefore Attorney Gildea interceded, and offered to contact PSM.

From the courthouse Attorney Gildea called PSM, notifying PSM that the trial was scheduled to commence shortly, and that SNRLP's personal counsel had been given permission not to attend. Although Attorney Gildea

specifically informed PSM of the judge's order to notify the carrier, PSM responded by stating that it "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." (App. 17a)

Although the trial judge had invited PSM to get involved in the case, and had indicated on the record a willingness to consider a request for continuing the trial date so that additional defense counsel could appear and get up to speed, PSM decided not to take any action in order to protect SNRLP.

After a jury trial on the merits of the underlying case, judgment was entered against SNRLP in the amount of $250,000 on August 4, 1998. (Pet. App. at 32a) In September, 1998 Attorney Cederbaum again contacted PSM, notifying PSM of the verdict and inviting the insurer to participate in post-trial efforts to settle the case or appeal. PSM responded by demanding a copy of the entire trial transcript, without offering to pay for same. (Id.) On April 4, 1999 the undersigned sent Mr. Blecher a letter, asking PSM to pay the judgment entered against SNRLP. PSM refused to respond.

In May, 1999 Peck sued PSM in Connecticut District Court, pursuant to Connecticut's direct action statute, C.G.S. § 38a-321. (Pet. App. at 33a) In June, 2001, six months after the expiration date for filing dispositive motions in the case, PSM filed a motion for summary judgment against Peck, arguing that SNRLP's failure to provide timely notice of the underlying claim defeated insurance coverage and precluded Peck's cause of action. Peck filed a sixteen page memorandum in opposition to summary judgment on July 16, 2001 (App. 1a-16a), which

included a sworn affidavit from Attorney Gildea concerning his efforts to notify PSM of the claims asserted against SNRLP prior to trial. (App. 17a) On July 26, 2001 Peck filed a supplemental memorandum in opposition to summary judgment which also included copies of PSM's file materials and excerpts from Mr. Jaconetti's deposition which confirmed that PSM knew about the claims being asserted against SNRLP in 1995, before Peck was deposed, before SNRLP was defaulted, and three full years before trial, but opted to close its file without providing defense or indemnification for *any* of the defendants on the basis that the complaint alleged facts outside of the scope of coverage. (App. 19a-30a)

Peck argued that PSM had waived any right to claim late notice by failing to issue a disclaimer of coverage to SNRLP. Peck also argued that PSM was not materially prejudiced by not receiving notice of the underlying claim until September 12, 1995 because there was still ample time to hire defense counsel and defend the case prior to trial. Finally, Peck argued that PSM's letter to Rattlesnake, wherein PSM denied coverage in any event because the claims asserted in the complaint fell outside the scope of coverage, proved that PSM did not change its position in any way because of SNRLP's failure to provide earlier notice of the claim; no matter when notice was provided, PSM was not going to agree to defend or indemnify any of the insureds. As there was no change in its position, PSM could not argue that it had been materially prejudiced by late notice.

In a November 11, 2001 unpublished decision and order, the District Court granted summary judgment for PSM solely on the late notice defense, finding that PSM had "been deprived of its right to defend" the underlying

lawsuit because it did not learn of the claims being made against SNRLP until after receiving the demand for payment from the undersigned on April 4, 1999. The District Court failed to comment on Peck's argument that PSM had waived its right to raise a late notice defense as a matter of law by failing to ever send a disclaimer letter to SNRLP prior to raising this defense in 2001, six years after first receiving notice of the claim in 1995 and more than two years after receiving a demand for payment of the judgment. (Pet. App. at 34a)

Peck filed a timely appeal with the Second Circuit Court of Appeals. On April 17, 2003 the Second Circuit reversed the District Court, and remanded the case for further proceedings in accordance with its opinion that the respondent had established that there remained genuine issues of material fact still in dispute concerning the issues of notice and alleged prejudice to PSM. Although Peck bore the burden of establishing that PSM was not materially prejudiced, the Court concluded that she had put forth enough evidence to show that PSM was not prejudiced so as to defeat summary judgment.

On or about May 7, 2003 PSM filed a petition for a rehearing and a petition for the matter to be heard en banc. (Pet. App. at 68a-77a) The panel of Judges who initially decided the appeal filed an errata sheet modifying a portion of their original decision on May 21, 2003, specifically acknowledging that Peck bore the burden of proof on the issue of material prejudice, but holding that "Peck has done so here." Thereafter, on June 13, 2003, PSM's petition for a rehearing and petition for a rehearing en banc were both denied by the Second Circuit. The order issued by the Second Circuit confirmed that PSM's petition for rehearing en banc had been transmitted to the judges

of the Court in regular active service and any other judge that heard the appeal and that no such judge had requested that a vote be taken thereon.

On July 2, 2003 the judgment of the District Court was officially vacated, and the case was remanded for further proceedings in accordance with the decision issued by the Second Circuit. The final decision issued by the Second Circuit Court of Appeals was reported as *Peck v. Public Service Mutual Ins. Co.*, 326 F.3d 330 (2d Cir. 2003). The petition for certiorari was filed on or about September 16, 2003.

REASONS FOR DENYING THE WRIT

I. This Case Involves the Application of Well-Established Law and its Application to a Motion for Summary Judgment and Does not Merit a Grant of Certiorari

This petition was filed after the Second Circuit Court of Appeals remanded the case to the District Court for further proceedings in order to further litigate factual issues pertaining to when PSM first received notice of the underlying action and whether PSM was materially prejudiced. The Second Circuit decision does not raise any new issue of law, and there is no split in authority among the circuits or the state courts of last resort in terms of the applicable law concerning the standards for summary judgment, nor is there a conflict with Supreme Court precedent.

Despite the petitioner's arguments to the contrary, the respondent did in fact submit sufficient evidence in opposition to summary judgment to properly defeat said motion.

The respondent submitted documentation from PSM's own claims file which established that PSM received notice of the claims filed against SNRLP in September, 1995, prior to SNRLP being defaulted, and three full years prior to trial. These documents made it clear that PSM recognized that separate claims were being asserted against SNRLP, and that there could be insurance coverage for those claims. Any subsequent prejudice to PSM came about because of its own refusal to hire defense counsel as obligated by the terms of the insurance contract, and not because of any inaction or neglect by SNRLP. The policy required PSM to defend, not SNRLP.

The respondent also submitted an affidavit from Attorney Brian Gildea, acting defense counsel in the underlying action at the time of trial, who states under oath that he personally called PSM prior to the commencement of jury selection in order to notify PSM of the approaching trial and the need to hire additional defense counsel for SNRLP, which was named as an additional insured on the PSM insurance policy. This call was made in direct response to an order of the trial court, which was offering to continue the trial if PSM and/or new defense counsel needed more time. PSM again opted to ignore the claim, telling Mr. Gildea that it "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." (App. 17a)

Any prejudice claimed by PSM was self-inflicted by its own refusal to properly respond to claims it knew to exist against an additional insured for three years before trial. Once more, even if PSM had received notice of the suit the very day it was filed, we can be certain that the insurer would not have acted any differently. PSM has consistently maintained that the insurance policy does not

provide coverage for the claims made by Peck. PSM refused to share in the costs of defending the other insureds, Rattlesnake and Opper, and refused to participate in post-trial settlement negotiations. The fact of the matter is that Peck's claims really are covered by the policy, but PSM is afraid to litigate that issue, and instead seeks to avoid that issue altogether by arguing a preemptive late notice defense.

The Connecticut Supreme Court has held that the issue of whether there is material prejudice to an insurer because of late notice should be determined on a *factual* basis by the jury, as opposed to a question of law decided solely by the court. *Aetna Casualty & Sur. Co. v. Murphy*, 206 Conn. 409, at 419-20, 538 A.2d 219 (1988). Similarly, whether PSM waived its ability to claim prejudice by its own actions and its own failure to ever issue a disclaimer letter to SNRLP is a question of material fact that should be decided by a jury after hearing all of the evidence. *Jenkins v. Indemnity Ins. Co.*, 152 Conn. 249, 259, 205 A.2d 780 (1964); *Kurzatkowski v. Kurzatkowski*, 142 Conn. 680, 684, 116 A.2d 906 (1955).

The decision below is consistent with Connecticut insurance law, and the Second Circuit properly remanded this case to the District Court so that these issues of material fact, which remain hotly contested by the parties, can be properly decided after being fully developed and explored at trial. The decision is consistent with this Court's holding in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), as the Second Circuit properly concluded that the respondent had met her burden of coming forward with specific facts showing that there was a genuine issue for trial concerning her contention that PSM was not materially prejudiced as a result of late notice. Peck produced

documentation from PSM's claims file, deposition testimony from PSM's claims supervisor, and an affidavit from defense counsel Gildea in support of her position, and this was more than sufficient evidence to defeat a motion for summary judgment on this issue.

The petition for certiorari should be denied. Issues concerning when notice was received and whether PSM was materially prejudiced are issues of fact, which should be decided at trial, and not by any appellate court. The respondent has a right to present her case at trial. The respondent was initially awarded $250,000 by a jury in 1998. She has waited six years for her day in court to prove that this award is covered by the terms of the petitioner's insurance policy. This case was properly remanded to the District Court, and should immediately proceed to trial. There is no reason for this Honorable Court to grant certiorari.

II. The Petitioner has Failed to Cite any Legal Authority in Support of its Contention that the Second Circuit Court of Appeals Abused its Discretion in Modifying its Original Decision

The petitioner cites no legal authority whatsoever for its claim that the Second Circuit Court of Appeals abused its discretion in using an errata sheet to modify its original decision. The modification was made on May 21, 2003, well before PSM's petition for rehearing en banc was denied on June 13. If any judge wanted to hear additional argument or to further examine the holding reached by the initial panel a vote would have been requested. No such request was made.

Given the petitioner's failure to cite any legal authority in support of its contention that the Court below abused its discretion, this Honorable Court should deny the petition for certiorari on this question as well.

CONCLUSION

For all of the reasons stated and discussed herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

1. Plaintiff's Memorandum in Opposition to Summary Judgment ..... App. 1
2. Affidavit of Attorney Brian M. Gildea ..... App. 17
3. Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment ..... App. 19
4. Claims Division Transaction Sheet ..... App. 22
5. Deposition Testimony of Daniel Jaconetti ..... App. 23
6. Loss Notice from Insurance Agency ..... App. 28
7. Correspondence from Attorney Eugene E. Cederbaum ..... App. 29

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELLEN M. PECK Plaintiff VS PUBLIC SERVICE MUTUAL INSURANCE COMPANY Defendant	CIVIL 3:99-CV-886(GLG) JULY 16, 2001

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS:

The court has ruled on numerous prior motions in this case which have set forth the facts giving rise to this lawsuit, and these will not be reiterated yet again by the plaintiff. However, it is important to underscore that the judgment obtained in the underlying case in 1998 was based upon the allegations set forth in the operative amended complaint dated June 1, 1998. While the defendant's brief addresses only the allegations set forth in two earlier complaints, it can not be disputed that the judgment at issue entered on a complaint filed in 1998. It is the operative complaint filed in 1998 which will determine whether there is insurance coverage for the judgment.

In addition, it should be noted that the defendant's motion for summary judgment has been filed well after the agreed upon cut-off date for the filing of dispositive motions, which was January 31, 2001 per the parties' report of second planning meeting filed on or about July 24, 2000. The plaintiff has had to incur costs in order to locate an expert witness for disclosure by September 1, 2001. The defendant should not be permitted to wait until this late

date to file a potentially dispositive motion. The motion is more than six (6) months past the agreed upon deadline, and it should not even be entertained by the court at this juncture.

II. LAW AND ARGUMENT:

The defendant's motion for summary judgment is based upon four different arguments. Each of these arguments will be addressed in turn.

(i) Time Span of Damages

First, the defendant argues that there is no insurance coverage for this claim because the complaint filed in the underlying action did not allege any damages to have occurred during the policy period, which began on December 1, 1994 and continued forward through December, 1998. A basic review of any of the three complaints filed in the underlying action reveal this argument to be completely without merit.

The original complaint, dated June 23, 1994, alleged a continuing course of conduct. While it is true that the complaint alleges that the noise problems *began* in October, 1992, it is equally true that the complaint also alleged an *ongoing*, regular course of conduct by the defendants. The defendants continued to cause damages from 1992 right up until the time of trial in 1998.

Each count of the complaint directed against South Norwalk Redevelopment Limited Partnership alleged in relevant part as follows:

> **"As a direct result of said improper use South Norwalk Redevelopment has caused**

Ms. Peck to suffer the following injuries in an ongoing, regular basis since October, 1992: . . ."

(a copy of the original complaint is attached as exhibit 3 to the defendant's memorandum)

The defendant focuses myopically on the 1992 *commencement* of the noise problem, completely ignoring the allegations of "*ongoing*, regular" misconduct which immediately precede the commencement date.

The word "ongoing" is an adjective, defined in The International Webster's Comprehensive Dictionary of the English Language (1999 Ed.) as "Going on, continuing or progressing." Thus it can not be disputed that the complaint alleged a *continuing* course of misconduct, as opposed to a single act that occurred on one specific date.

While the conduct began in 1992, it continued, unabated, for years thereafter. The Rules of Practice did not require the plaintiff to file a series of amended complaints every week up until the time of trial in 1998 in order to offer evidence about conduct that occurred throughout 1995-1998; her original complaint alleged an *ongoing* problem, and entitled her to offer evidence of a *pattern of misconduct* by the defendants which took place in the years that followed the initiation of the lawsuit.

The complaint is not ambiguous. It alleged an ongoing course of conduct that took place during the time policy period. Nowhere in the complaint does it say that the noise ended, nor does it allege damages "up until the present time" of the initial filing date. A plain reading of the complaint and the claims for damages indicates that the

plaintiff was suing for an ongoing course of conduct. The wording of the complaint looks forward, not back.

Even if the court should find any ambiguity as to the time when damages were alleged to have occurred, the ambiguity must be read in favor of coverage not against coverage as argued by the defendant. *See, e.g., Stephan v. Pennsylvania Mutual Assurance Co.*, 224 Conn. 758, 763 (1993); *Streitweiser v. Middlesex Mutual Assurance Co.*, 219 Conn. 371, 375 (1991); *Schultz v. Hartford Fire Insurance Co.*, 213 Conn. 696, 712 (1990); *Missionaries of the Company of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 108 (1967).

As the defendant presents its arguments in a summary judgment motion, it is also important to recognize that the issue of when the damages took place is a question of material fact, which should be left to the jury to decide. The jury can examine the operative complaint, and decide whether the complaint alleges any facts that trigger insurance coverage. Summary judgment is inappropriate to decide disputed issues of material fact, and again all inferences and ambiguities must be read in favor of the non-moving party. *Gallo v. Prudential Residential Partnership*, 22 F.3d 1219 (2d Cir. 1994). *See also* FRCP 56(c), which provides that summary judgment is only appropriate if there is no genuine issue of material fact in dispute.

In the case at bar the defendant asks the court to limit its review to the initial complaint filed by the plaintiff in 1994. The defendant also asks the court to ignore the amended complaint filed in 1998. No legal authority is provided in support of this skewed analysis. It can not be disputed that the 1998 complaint was the operative complaint at the time of trial, and superseded the earlier

complaint. Practice Book § 10-60. In addition, the amended complaint was submitted as an exhibit in the underlying trial, and the record clearly demonstrates that the jury's verdict was based solely upon that amended complaint.[1]

The defendant submits no legal authority in support of its argument that the original complaint should control in determining the scope of insurance coverage. Although there may be a question in dispute as to whether the defendant received notice of the amended complaint, that is another question of material fact that needs to be resolved by the jury.

The plaintiff has obtained an affidavit from trial counsel in the underlying case, Attorney Brian Gildea, attesting to the fact that he contacted Public Service Mutual prior to trial, specifically to inform the defendant that a default had entered against SNRLP, and that additional defense counsel should appear.[2] Thus, there was still time for the defendant to get involved in the underlying case prior to trial, and to find out about the existence of an amended complaint. The evidence indicates that the defendant knew or should have known about the amended complaint, but decided to ignore the entire matter in the hope that it would never be pursued.

In total, three complaints were filed in the underlying action prior to trial. All three of the complaints alleged a continuing course of conduct that caused damages from

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[1] A copy of the amended complaint submitted to the jury is attached as "Exhibit 1."

[2] A copy of the affidavit is attached as "Exhibit 2."

1992 up until the time of trial in 1998. In cases involving multiple occurrences causing damages over several years, the "multiple injury trigger" test must be applied in order to determine whether there is insurance coverage. *United Technologies Corp. v. American Home Insurance,* 989 F. Supp. 128, 153 (D. Conn. 1997). If any of the damages occurred during the policy period, insurance coverage is triggered; even if the initial damages started prior to when the policy went into effect. *Id.*

The plaintiff has determined that the defendant collected approximately $90,000.00 in insurance premiums for the insurance coverage it provided to Rattlesnake Ventures, Inc. and SNRLP throughout 1994-1998. Additional premiums were collected because SNRLP was added [sic] an additional insured. Although the plaintiff produced enormous amounts of evidence throughout the underlying case which proved that her damages occurred throughout 1995, 1996, 1997 and 1998, the insurance company now argues that there is no coverage because all of the damages occurred prior to when its policy first went into effect in December, 1994. The defendant's argument ignores the facts, and lacks the support of any legal authority. The argument should be rejected by this court, especially when presented in the context of a motion for summary judgment.

(ii) Lack of Notice

The defendant also argues that it is entitled to summary judgment because SNRLP never provided notice of the underlying action. This arguments [sic] must fail to [sic] for three different reasons. First, the defendant is legally estopped from raising the notice issue because (a) it

refused to defend the underlying lawsuit even after becoming aware of its existence prior to trial; and (b) it has never disclaimed coverage for lack of notice, and can not raise this issue for the first time at trial. Second, a complete copy of the summons and complaint was admittedly received by the defendant from SNRLP's insurance agent in 1995. Although the agent only mentioned the named insured (Rattlesnake) on the claim submission form, the summons and complaint clearly listed SNRLP as a separate defendant, thus providing actual notice that claims were being made against SNRLP as well as Rattlesnake.

Finally, Attorney Brian Gildea had appeared for *all* defendants in the underlying case, and he has provided an affidavit that he again notified the defendant about this case prior to trial. Thus, a lawyer formerly representing SNRLP is on record as having provided additional notice to the defendant *prior to* jury selection and prior to trial.

Although three years has elapsed since the verdict was obtained in the underlying case, the defendant has never disclaimed coverage for this claim by sending a letter denying coverage to its insured, SNRLP. The law is well established; an insurance company can not remain silent for years, and then disclaim coverage after the verdict. *National Union Fire Ins. Co. v. Mastroni*, 754 F. Supp. 269, 272 (D. Conn. 1990).

The defendant claims that it did not realize that its policy also covered SNRLP when the [sic] it first received the summons and complaint from the agent in 1995. The defendant should be responsible for knowing who it insures. SNRLP was named as an additional defendant on *every* policy, and listed *separately* on the declarations pages. In addition, the defendant collected additional

premiums for the extra coverage afforded to SNRLP. If the defendant failed to recognize that the policy also covered SNRLP, the fault lies with the defendant, not with Ellen Peck.

Attorney Gildea provided additional notice to the defendant prior to trial. At that time the defendant ignored the notice, indicating to Mr. Gildea that the file was closed. Again, the defendant failed to notify SNRLP prior to trial that coverage was being denied. SNRLP chose not to pay its own attorney, Paul McCullough, to participate in the trial because (1) it felt that legal defense should be provided by the insurance company, and (2) assumed that any award would be covered by insurance. Had the defendant advised SNRLP of its position prior to trial, SNRLP may have taken a different position.

The parties agree that the only notice of disclaimer sent by Public Service Mutual was that provided to Rattlesnake Ventures, Inc. No notice has ever been sent to SNRLP. A notice of disclaimer to one party to insurance contract does not operate as a disclaimer to any other party who has not received proper notice from the insurer. *Hartford Accident & Indemn. Co. v. J.J. Wicks, Inc.*, 104 A D.2d 289, 294, 482 N.Y.S.2d 935, 939 (4th Dep't 1984); *John v. Centennial Ins. Co.* 91 A.D.2d 1104, 1105, 458 N.Y.S.2d 350, 352-53 (3d Dep't), *appeal denied*, 59 N.Y. 2d 605, 451 N.E.2d 505, 464 N.Y.S.2d 1026 (1983). A refusal to take *any* action after receiving notice of the claim constitutes a legal waiver of a later claim for defective notice. *Travelers Ins. Co. v. Central Nat'l Ins. Co. of Omaha*, 733 F. Supp. 522 531 (D. Conn. 1990).

Even if notice of a claim is late, the insurer still has a duty to defend the case under a reservation of rights. A

failure to take any action waives the right to later raise the notice issue. *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 155-157 (1996); *Keithan v. Massachusetts Bonding & Ins. Co.*, 159 Conn. 128, 139 (1970); *Missionaries of the Company of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 113 (1967). *See also, Lee v. Aetna Casualty & Surety Co.*, 178 F.2d 750, 751 (2d Cir. 1968); *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 532 (Iowa, 1995).

As the defendant has failed to ever notify its insured that notice was defective, it can not now raise this issue as a defense to coverage at the time of trial. The defendant has waived the right to raise a policy defense of lack of notice, and should be estopped from making this argument.

Even if the defendant is permitted to raise a lack of notice defense, this would not be dispositive of this case. The plaintiff would still be permitted to offer evidence to show that the defendant was not prejudiced by the alleged lack of notice.[3] *Aetna Casualty & Surety Co. v. Murphy*, 206 Conn. 409, 412-19 (1988). The defendant may also defeat lack of notice by showing justifiable excuse on the part of SNRLP. *Monteiro v. American Home Assurance Co.*, 177 Conn. 281, 233 (1979). Thus, the defendant is not entitled to summary judgment on this issue.

---

[3] The defendant refused to provide coverage or a legal defense to Rattlesnake Ventures, Inc., and would have denied coverage and legal defense to SNRLP, no matter when notice was provided. The reality is that the defendant would not have changed its position, and was not prejudiced in any way because of the alleged lack of notice from SNRLP.

It is anticipated that the plaintiff will produce Attorney Paul McCullough at trial, and that he will explain to the jury that he repeatedly asked the lawyers hired to defend Rattlesnake (hired by Travelers and the Insurance Company of Greater New York) to assume the defense of SNRLP as well, as required by the lease agreement. Unfortunately, the tenant had not obtained additional coverage for SNRLP for all of the years of the lease agreement, as originally agreed. SNRLP was only added as an additional insured on one of the insurance policies, the one issued by Public Service Mutual. As Public Service Mutual refused to defend Rattlesnake, there was no way it would agree to defend SNRLP.

Attorney McCullough will testify that he did not have access to the insurance policies purchased by Rattlesnake, and did not know who to call directly. Not having this information, he directed his demands for a legal defense and insurance coverage to Rattlesnake Ventures, Inc. and the lawyers defending Rattlesnake at the request of the various insurers. If this information was not properly passed on to the defendant, the jury may conclude that SNRLP had a justifiable excuse for not providing notice directly to the carrier.

It is further expected that testimony will be presented at trial from Attorneys Eugene Cederbaum, Louis Annechino, and Andrew Turret who were hired by Travelers Insurance Company to defend Rattlesnake. Although they attempted to communicate with Public Service Mutual, the defendant consistently refused to respond, indicating that it had simply closed its file and did not want to be bothered. Even if the defendant had received notice of this claim, it would have done nothing differently. There was no prejudice to the defendant.

(iii) Voluntary Default

The defendant complains that SNRLP voluntarily allowed a default to enter against it, and refused to incur the substantial costs of paying for its own lawyer to defend the case throughout trial. However, this argument ignores the fact that Public Service Mutual was the one who had the obligation to provide a legal defense under the terms of the policy. Even after receiving a telephone call from Attorney Gildes, asking for separate trial counsel for SNRLP, the defendant refused to act. Having breached the insurance contract, the defendant can not now blame its insured for failing to provide a proper legal defense.

In *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144 (1996) the defendant not only refused to defend the lawsuit brought by the plaintiff, but actually entered into a stipulated judgment in the amount of $500,000. In addition, the defendant provided the plaintiff with an assignment of rights to pursue the judgment directly against the insurance company. In exchange, the plaintiff agreed not to look to the defendant, individually, to satisfy the award. The insurance company cried foul, arguing that the insured unfairly cooperated with the plaintiff by agreeing to a large judgment. The Connecticut Supreme Court held that this was entirely proper, given the circumstances.

The court held that when an insurer has refused to defend its insured, it is in no position to argue that the steps the insured took to protect itself should inure to the insurer's benefit. 239 Conn. 144, 154, 156. Moreover, once an insuror has refused to defend, it can not thereafter dispute the insured's liability to the injured person. Instead, the insurer must pay the judgment. *Id.* at 160.

In the case at bar the insured defendant did not stipulate to an inflated judgment. The attorney for the insured simply refused to participate further in the trial because no one would pay his fees. Repeated requests made to the insurance company lawyers hired to represent the co-defendant (to assume the defense of SNRLP as well) were ignored. At that point SNRLP had no obligation to look out for the interests of the insurance company. Public Service Mutual knew about the situation, by [sic] chose not to get involved. The jury later awarded damages against SNRLP. Public Service Mutual should have to pay the award in full.

The defendant also points out that Attorney McCullough made an inaccurate representation about a bankruptcy proceeding, and failed to follow a court order to notify the insurance company about the trial. While it is unfortunate that these things occurred, they have no bearing on the legal issues in this case. First, there has been no showing that SNRLP knew about any of these facts, or that Attorney McCullough advised his client about the judge's order. Second, evidence has been produced that Attorney Gildea, who was also in court at that time, did in fact contact Public Service Mutual immediately thereafter to notify the carrier about the trial and the fact that SNRLP was no longer being represented by counsel. It may well be that Attorney McCullough asked Mr. Gildea to make this call on his behalf, thus satisfying the order of the court.

Attorney Gildea and Attorney McCullough will both testify at trial, and will explain their actions to the jury. In the end, it will be clear that Public Service Mutual received notice of the trial and the fact that SNRLP was not being represented prior to the commencement of evidence.

It will also be established that the defendant decided not to take any action to protect SNRLP, even though it could have hired legal counsel, and asked for a continuance of the trial date if necessary. Given these circumstances, SNRLP had no obligation to defend the case at its own expense in order to protect Public Service Mutual from its obligation to pay the judgment.

The defendant's reliance on *Brown v. Employer's Reinsurance Corp.*, 206 Conn. 688 (1998) is completely misplaced. The insurance policy at issue in *Brown* required the *insured* to hire defense counsel, not the insurance company. Thus, the insured's failure to properly defend the case was found to constitute a breach of the insurance policy. In the case at bar the insurance contract clearly required Public Service Mutual to provide SNRLP with a legal defense. There was no contractual obligation for SNRLP to hire its own attorney to defend the case at its own expense. Thus, the holding in *Brown*, which is premised entirely on the terms of a different type of insurance policy, is irrelevant to this case.

(iv) Bodily Injury or Property Damage Claims

Finally, the defendant argues it is entitled to summary judgment because none of the plaintiff's claims qualify as either "bodily injury" or "property damage" under its policy. The latter claim is somewhat remarkable, given Attorney Dickins's 1998 opinion letter, which concludes that the award may in fact constitute "property damage" under the terms of the policy.

The Connecticut Appellate Court has held that claims solely for emotional distress, in the context of a pure commercial transaction, do not qualify as a form of "bodily

injury" under the typical commercial policy. *Moore v. Continental Casualty Co.*, 252 Conn. 405 (2000). The plaintiff's allegations do not stem from a commercial transaction, and the *Moore* holding may not apply. In addition, the plaintiff's complaint also alleged injuries for sleep deprivation. No case has yet ruled on whether regular sleep deprivation, and its effects on a person's ability to function, qualify as a form of "bodily injury." It should be left to the jury to decide this disputed question of fact.

With respect to the claim for "property damage" the issue is more clear cut. The plaintiff's complaint alleged a loss of the quiet enjoyment of her property whenever loud music was played at the defendants' nightclub (up to eight times over the legal limit). Black's Law Dictionary defines "quiet enjoyment" as "the possession and use of the premises in peace and without disturbance." Black's Law Dictionary, 6th Ed. (1991). Three to four nights each week the plaintiff was unable to use her home. Evidence was presented from neighbors and from investigating police officers that the noise was so loud all of the dishes clanked, and you could not hold a normal conversation or even watch television. This type of "loss of use" qualifies as a form of "property damage" under the defendant's policy. This is especially true when considering that any ambiguity must be read *in favor* of coverage, and not against coverage.

When asked to provide his professional opinion as to the insurance coverage issues in 1998, Attorney Dickins opined that the judgment returned in the underlying case could be covered as "property damage." Although a motion has been filed with the court by the defense, asking for that document to be returned, the court should still

consider the document insofar as it establishes that a legitimate argument can be made for insurance coverage. In light of all the circumstances, summary judgment would be inappropriate.

III. CONCLUSION:

For all of the reasons stated and discussed herein, the plaintiff objects to the defendant's motion for summary judgment, and asks that the motion be denied by the court. The defendant willingly refused to get involved in the underlying case in any way. The defendant gambled, assuming that the plaintiff would probably make a minimal recovery and/or would fail to pursue any judgment obtained against SNRLP. The defendant has since compounded its error by refusing to attend a global settlement mediation, or to make any serious offer to resolve this case.

The judgment at issue is now worth approximately $400,000.00, including post-judgment statutory interest. The plaintiff should be given a fair day in court, in order to prove her claims at trial. The defendant's motion should be denied.

THE PLAINTIFF

By: JOHN W. MILLS, ESQ.
Murphy and Karpie, LLC
350 Fairfield Avenue
Bridgeport, CT 06604
Federal Bar No.; ct11706
Tel: (203) 333-0177

CERTIFICATION

This is to certify that a copy of the foregoing document has been mailed, U.S. Mail, postage prepaid on July 16, 2001 to:

Oliver Dickins, Esquire
1 Phelps Lane
Simsbury, CT 06070-2215

Geoffrey Naab, Esquire
295 East center Street
Manchester, CT 06040

JOHN W. MILLS

PLAINTIFF'S EXHIBIT W

CV 94 0139352 S	: SUPERIOR COURT
ELLEN M. PECK	: J.D. OF STAMFORD/
VS	: NORWALK
RATTLESNAKE VENTURES, INC.	: AT STAMFORD

AFFIDAVIT

I, BRIAN M. GILDEA, being duly sworn, hereby depose and state:

1. I am over the age of eighteen (18) and believe in the obligations of an oath.

2. I am currently an attorney at law licensed to practice in the State of Connecticut.

* * *

4. On July 21, 1998 I was the attorney representing the defendants, William J. Opper and Rattlesnake Ventures, Inc. in civil lawsuit entitled Ellen M. Peck v. Rattlesnake Ventures, Inc., et al, CV 94 0139352 S, pending in the Stamford Superior Court.

5. I was present in court on July 21, 1998 when said case was scheduled to commence jury selection.

6. I was also present in court when the Honorable Douglas Mintz addressed the issue that one of the defendants, South Norwalk Redevelopment Limited Partnership, would not be represented by counsel because Attorney Paul McCullough requested permission not to attend the trial.

7. Following the colloquy between Judge Mintz and Attorney McCullough I contacted the Public Service

Mutual Insurance Company in Manhattan, in order to advise the claims handler that the case was scheduled to commence trial and that there would be no attorney present in order to defend its insured, South North Redevelopment Limited Partnership.

8. Although I successfully relayed this information to the Public Service Mutual Insurance Company on July 21, 1998, the claims handler simply responded by saying that Public Service Mutual had closed their file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation.

/s/ Brian M. Gildea
Brian M. Gildea

STATE OF CONNECTICUT
SS: NEW HAVEN
COUNTY OF ~~FAIRFIELD~~ NEW HAVEN

Subscribed and sworn to before me this 7th day of February, 2001.

/s/ Christine M. Johnston
NOTARY PUBLIC/
~~COMMISSIONER OF SUPERIOR COURT~~

My Commission Expires Dec. 31, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELLEN M. PECK Plaintiff VS PUBLIC SERVICE MUTUAL INSURANCE COMPANY Defendant	CIVIL 3:99-CV-886 (GLG) JULY 26, 2001

SUPPLEMENTAL MEMO IN OPPOSITION TO SUMMARY JUDGMENT

On May 18, 2001 the plaintiff deposed the defendant's claims manager, Daniel Jaconetti. The deposition transcript just recently arrived. Mr. Jaconetti was the person who reviewed the plaintiff's complaint when it was first sent to the defendant by the insurance agent in 1995. Attached hereto is a copy of the Claims Division Transaction Sheet filled out by Mr. Jaconetti on September 14, 1995. As indicated in item #4, Mr. Jaconetti concluded that there was in fact insurance coverage for Counts Three, Five and Seven of the Complaint. This was confirmed at Mr. Jaconetti's deposition.

Although the defendant now argues that it is entitled to summary judgment because there is no insurance coverage for any count of the complaint, because of when the complaint was originally filed, its own claims manager, the person in charge of the entire claims department, concluded otherwise in 1995. Mr. Jaconetti read the complaint, and concluded the policy covered some of the allegations. Nowhere on the intake sheet is there an indication that the complaint alleged conduct occurring wholly outside the policy period.

The intake sheet also indicates (#4) that there may be coverage for Counts Nine and Ten against SNRLP, depending on whether the landlord is an additional insured on the policy. Thus, this exhibit clearly establishes that the defendant knew that additional allegations were made against SNRLP, and knew enough to check and see if SNRLP was named as an additional insured on the policy. The defendant now claims that it had no notice of any claims made against SNRLP, and no reason to know that it insured SNRLP as an additional insured on the policy. The attached Exhibit proves those arguments to be false; points #3 and #4 establish that the defendant immediately knew that there was a co-defendant named in the complaint, and that the policy would also provide coverage for the co-defendant if the co-defendant was named as an additional insured on the policy, which it was.

The defendant's motion for summary should be denied by the court, so that Mr. Jaconetti can explain to the jury why he later refused to provide coverage, or even a legal defense to any of the defendants in the underlying case, or to advise SNRLP that coverage was being denied.

THE PLAINTIFF

By _____

JOHN W. MILLS
MURPHY and KARPIE
350 Fairfield Avenue
Bridgeport, CT 06604
Federal Bar No.: Ct11706
Tel: (203) 333-0177

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, U.S. Mail, postage prepaid on to:

Oliver Dickins, Esquire
One Phelps Lane
Simsbury, CT 06070

Geoffrey Naab, Esquire
295 East Center Street
Manchester, CT 06040

JOHN W. MILLS

ENTREX = (CHANGE)

CLAIMS DIVISION TRANSACTION SHEET

FILE #: 11-441550 REQUESTED BY: DA DATE: 9/14/95

POLICY NUMBER: 74-319169 ACCIDENT DATE: 12/1/94

☑ SET-UP

ACCIDENT STATE CODE 06

CAT CODE

SUFFIX	EXAMINER'S CODE	SPECIFY TYPE OF COVERAGE	CLAIMANT	RESERVE
01	L016	BI	Fleischeck 9/15	#99

STAMFORD

DESCRIPTION OF LOSS:

DIARY INSTRUCTIONS:

☐ RESERVE CHANGE SUFFIX ____ TO (NEW) $ ____ AUTH. BY: ____

SUFFIX ____ TO (NEW) $ ____ AUTH. BY: ____

②

LINE	KD	TR	SUB CODE	CO	POLICY NO.	CLAIM NUMBER	SUF	RESERVES	FACULATIVE SUF	FACULATIVE CO	REINSURANCE AMOUNT

☐ CLOSE CLAIM SUFFIX ____ SUFFIX ____ FACULATIVE REINSURANCE

③

LINE	KD	TR	CO	POLICY NO.	CLAIM NUMBER	SUF	SUF	CO	SUF	CO	SUF	CO

☐ ISSUE CHECK ☐ PAYMENT ☐ EXPENSE PROVIDER NO.: ____ AUTH. BY: (KOSH)

ADDITIONAL INSTRUCTIONS:

$ ____ SUFFIX ____ TO: (PAYEE) ____

FOR LOSS ONLY – CHECK BOX BELOW:

PARTIAL PAY ☐ TR. 52

FINAL PAY ☐ TR. 50

ADD FINAL PAY ☐ TR. 51

BLECHER: LOOKS LIKE WE ARE THE LAST CARRIER IN LINE –

① HAS Anyone Answered For Insd. & Principal Yet? 5/2/97 6/94

② " " " " Co-Δ Yet?

③ " Co-Δ Sought Def. & Indem. From Insd.? (NO)

④ Counts 3,5+7 are Cov'd. (NOTE: missing pg. 8 of EC.

Counts 9+10 Possibl. Depending upon Lease Agree.

AND IF Co-Δ is Add'l. Insd. on Policy

⑤ Punitive No Cov'd. –

OK ⑥ GET H.C. OF Polic. & LEASE ASAP

⑦ Ltr. Disc. Coverage Position with All Above Rec'd. & Known –

$ ____ SUFFIX ____ TO: (PAYEE) ____

FOR LOSS ONLY – CHECK BOX BELOW:

PARTIAL PAY ☐ TR. 52

FINAL PAY ☐ TR. 50

ADD FINAL PAY ☐ TR. 51

☐ REOPENING

SUFFIX	EXAMINER'S CODE	RESERVES

SUFFIX ____

SUFFIX ____

☐ PROCESS REIMBURSEMENT ____ SUFFIX ____ REASON ____

☐ STOP PAYMENT; ☐ VOID

TO BE APPLIED TO: ☐ PAYMENT; ☐ EXPENSE

$ ____ SUFFIX: ____ CHECK #: ____

CHECK TO BE REISSUED: ☐ YES; ☐ NO; ☐ UNDETERMINED AT THIS TIME

☐ SPECIAL "K" (REQUIRED FOR PAYMENT, IF FILE IS CLOSED 18 MONTHS OR MORE)

Left Msg. for Ms. Bloss AD 9/18/95 9/18/95

RL 9-15-95

COMPLETED BY DATE VERIFIED BY DATE

3398 C 9/93

☐ DATA ENTRY/STAT ☐ FILE COPY ☐ CLAIMS CONTROL

PLAINTIFF'S EXHIBIT H Id 5-18-01

App. 22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ELLEN M. PECK	*	
PLAINTIFF,	*	
VS	*	
GREATER NEW YORK MUTUAL INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INSURANCE COMPANY	*	Civil Action No. 3:99-CV-886 (GLG)
DEFENDANTS.	*	

DEPOSITION OF DANIEL JACONETTI, taken pursuant to the Federal Rules of Civil Procedure, at the law offices of MURPHY AND KARPIE, LLC., 350 Fairfield Avenue, Bridgeport, Connecticut, before Carol J. Beecher, a Registered Professional Reporter and Notary Public in and for the State of Connecticut on FRIDAY, MAY 18, 2001 at 11:30 A.M.

BEECHER & HORVATH
73 MILLBROOK ROAD
NORTH HAVEN, CT. 06473
(203) 230-0010
FAX (203) 281-3429

* * *

[49] particular case for some years now and having brought with you today your claims file, can you tell me one way or the other as to whether you ever received a

copy of the summons and complaint in the underlying action?

A I'm sure we've received it at some point.

Q Can you tell me when?

A Specifically, no.

Q Is it fair to say that, anyway as of September 14th, 1995 that you opened a file on this case?

A I opened the file and based on what I wrote here I had to be looking at a summons and complaint.

Q May I see that, please.

A (Witness handed document to counsel.)

Q Do you fill out a Claims Division Transaction Sheet for every claim that comes in?

A For every set up of claim, yes.

Q It says here, "Accident state code 06." I that Connecticut?

A Yes.

Q "Examiner's code LO 16." Is that you?

A No. That's an internal code. That's [50] Mr. Blecher's code.

Q And specify the type of coverage. BI is bodily injury?

A Correct.

Q The claimant is Ellen Peck?

A Yes.

Q The reserve is 99?

A $99 is a code reserve. It's a reserve that is put on every claim that's set up where we don't know whether or not we have coverage, when we don't know the value of the claim.

Q Is it fair to say at some point from September 14, 1995 until today, the reserve was raised from $99 to $50,000?

A Yes.

Q This is at the bottom, there's initials, completed by. Is that your initial there?

A No, it is not.

Q Who is that?

A That may be Pat Lilly, PL. She used to be one of the clerical support staff.

Q And dated 9/15/95. Why would that –

A That would be for the file. Basically, let me explain. I fill out this sheet, it's green [51] in color. I fill out this sheet and I attach to the sheet the first report notice. I hand it into the clerical support staff. They, in turn, just hand it back to me with a file number and a blank file jacket, and that's probably what that is about.

Q Now, underneath that under the additional instructions there's a notation that says Blecher. Is that Barry Blecher?

A Yes.

Q "It looks like we are the last carrier in line." You see that?

A Yes.

Q Also an indication, "rush" is written up there. What is that?

A That's my writing "rush" to Mr. Blecher, that he has to take care of this immediately.

All of this right here, not the okay, but all of this which you can see, that's all my handwriting. This is my initials right here.

Q You have listed several items, you have circles 1, 2, 3, all the way through 7. There's a line you have something written through?

A That's correct.

[52] Q Would you agree that you filled this out September 14, 1995?

A Yes.

Q At that time didn't you put as number 4 that counts 3, 5 and 7 of the complaint were covered?

A That's what I wrote.

Q Now, once you filled out Exhibit H and a file jacket was created and you wrote this note to Mr. Blecher, did the file then go to Mr. Blecher for future handling?

A Yes.

Q And from that point forward did you have any day-to-day involvement with the file that you can recall?

A If and when Mr. Blecher brought it to me for further discussion.

Q Let me show you what's been marked as Plaintiff's Exhibit J. This is a letter to Barry Blecher from Gene Cedarbaum at Goldstein and Peck. It says he's giving PSM a copy of the revised complaint dated August 29, 1994 and an amended answer and special defense.

MR. DICKINS: You want him to review

* * *

PLAINTIFF'S EXHIBIT
I

®

United Insurance Agencies, Inc.

Phone: 203-339-6300 • Fax: 203-339-6322
2890 Main Street, P.O. Box 289 •
Stratford, CT 06497-0289

FAX

FROM

RONALD FITELSON

DIRECT PHONE # (203) 339-6327

DATE:	9/12/95
TO:	Liability Claims Dept.
COMPANY:	PSM
RE:	Rattlesnake Bar & Grill
TO FAX #:	1-212-268-9675
# OF PAGES:	20

Please Find Enclosed Loss Notice & Summons.

Please Contact Insured's Atty

Gene Cederbaum ASAP 203-226-7488

Fax 203-226-6403

Any Questions Please Call.

/s/ Ronald Fitelson

United Insurance Agencies, Inc.,
Main Street, P.O. Box 289, Stratford, CT 06497-0289

TEL: (203) 339-6300 FAX: (203) 377-8414

Rattlesnake Bar & Grill	11-441550 Please refer to this # on all inquiries

CLAIMANT	LOSS LOCATION	LOSS DATE 12-1-94
Ellen Peck	Norwalk, Ct	DATE REPORTED 9-14-95
EXAMINER	PHONE #	POLICY #
B Blecher	(212) 560-5022	4-319169

CLAIM TYPE:

AUTOMOBILE/CYCLE ☐ LIABILITY ☒

WE HAVE RECEIVED A REPORT OF THE ABOVE LOSS WHICH WILL RECEIVE OUR PROMPT ATTENTION

PSM INSURANCE COMPANIES
PUBLIC SERVICE MUTUAL INSURANCE COMPANY
PARAMOUNT INSURANCE COMPANY
132 WEST 31ST STREET
NEW YORK, NY 10001-3406

TOLL FREE #
1-800-223-5213

9059 12/90 ACKNOWLEDGEMENT COPY

[Names Omitted In Printing]

September 8, 1995

Mr. Ron Fitelson
Max Fitelson & Son, Inc.
2546 Main Street
Bridgeport CT 06606

Re: Ellen Peck v. Rattlesnake Ventures Inc., et al.

Dear Mr. Fitelson:

This letter will confirm my understanding reached yesterday when we spoke that you will formally put Public

Service Mutual Insurance company on notice of the above law suit. For your information, I am enclosing a copy of the Revised Complaint dated August 29, 1994 and the defendants' Answer dated October 5, 1994.

Please be advised that Thomas Stevens, Esquire, of Gildea & Stevens, L.L.C., has appeared for the defendants under the insurance policy with Greater New York. Although Aetna had originally contested coverage, they are reconsidering their position. Goldstein and Peck P.C. has also filed an appearance on behalf of the defendants. You may advise PSM to contact me, should they desire, at our Westport Office, 190 Main Street, 203-226-7488.

Kindly send me a copy of your letter to PSM. Should you have any questions, please feel free to contact me.

Yours truly,

/s/ Eugene E. Cederbaum
Eugene E. Cederbaum

EEC: cav
Encls.
cc: Mr. David Sederholt
Mr. William Opper
G. Kenneth Bernhard, Esq.

Supreme Court, U.S.
FILED
OCT 29 2003
OFFICE OF THE CLERK

(3)

No. 03-0393

In the

Supreme Court of the United States

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

ELLEN M. PECK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

Oliver B. Dickins
Counsel of Record
1 Phelps Lane
Simsbury, CT 06070
(860) 658-4100
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Second Circuit's Opinion Violated Celotex v. Catrett 1

II. The Use of Errata to make Substantive Changes in the Judgment was an Abuse of Discretion 4

A. Even After The Errata Sheet's "Correction" the Insurance Company Was Still Entitled to Summary Judgment 5

B. Using an Errata Sheet to Substantially Alter the Judgment is An Abuse of Discretion 6

C. Using Errata to Materially Change an Opinion Review Contradicts the Appellate Rules 7

D. The Opinion Resulting from the Errata Sheet Will Result in Error and Confusion on Remand 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

AETNA CAS. & SURETY CO. v. MURPHY, 206 CONN. 409, 419, 538 A.2D 219 (1988) 1

ALABAMA v. GEORGIA, 64 U.S. 505, 506 (1859) 6

BORIA v KEANE, 99 F.3D 492 (2D CIR., MAY 3, 1996) 7

CALDERON v. THOMPSON, 523 U.S. 538, 549, 567 (1998) 7

CELOTEX CORP. v. CATRETT, 477 U.S. 317 (1986) 1, 4

CITY OF WEST HAVEN v. UNITED STATES FIDELITY & GUAR. CO., 174 CONN. 392, 397, 389 A.2D 741 (1978) 5

HANNA v. PLUMER, 380 U.S. 460, 471 (1965) 8

IN RE MCKENNA, 238 F.3D 186 (2D CIR. 2001) 7

IN RE WEST TEXAS MARKETING CORP. (UNITED STATES v. KELLOGG), 12 F.3D 497 (5TH CIR. 1994) 7

NGUYEN v. UNITED STATES, 123 S.CT. 2130, 2138 N.13 (2003) 9

I. THE SECOND CIRCUIT'S OPINION VIOLATED *CELOTEX v. CATRETT*.

This case deals with the continued viability of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which held that, in federal summary judgment matters, the party with the burden of proof at trial on a particular issue has the burden of presenting substantial evidence on that issue. Without such evidence, Rule 56 "mandates" the entry of summary judgment. 477 U.S. at 322.

This insurance coverage case involves late notice to the insurer. In late-notice cases, Connecticut law puts the burden on the plaintiff to show that the insurer was not prejudiced by the delinquency. *Aetna Cas. & Surety Co. v. Murphy*, 206 Conn. 409, 419, 538 A.2d 219 (1988) ("The burden of showing lack of prejudice must be borne by the insured.").

Because the plaintiff produced no evidence to show lack of prejudice, Rule 56 requires the entry of summary judgment against her.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. at 322. Thus, the defendant was entitled to summary judgment.

In the case below, The Second Circuit did not, and could not, find that the plaintiff introduced evidence of lack of prejudice. The plain fact is that the plaintiff submitted no evidence on this critical issue. Accordingly, *Celotex* required summary judgment for the defendant.

Instead of finding a substantial conflict in the evidence regarding the material issue of lack of prejudice, the Second Circuit found a conflict in the evidence on an immaterial issue – whether the insurer received notice in September 1995 (which was some 15 months too late) or September 1998 (even later, by three years). Under either theory, notice was too late. Since notice was late, the burden was on the plaintiff to introduce evidence that the tardiness in the notice resulted in no prejudice to the insurance company. In failing to impose this burden on the plaintiff, the Court of Appeals violated this Court's ruling in *Celotex*.

Opposing certiorari, the plaintiff continues to use speculation, not evidence, in her effort to defeat summary judgment. Even though Rule 56(e) requires sworn testimony based on admissible facts, the plaintiff has submitted nothing to show that the insurance company was not prejudiced. Instead she simply repeats her continuing mantra that she is "certain" if she gets to trial, she will be able to show that even if the insurer had received prompt notice, it would not have acted differently. See Opposition Brief, at 10 ("Even if PSM had received notice of the suit the very date it was filed, we can be certain that the insurer would not have acted any differently.") Since the plaintiff introduced no evidence to show that the insurer was not prejudiced, the courts below were

obligated to summarily dismiss her claim.

The plaintiff asserts that there was evidence in the record to show that PSM was not prejudiced by the late notice. Opposition Brief, at 12. Yet the so called proof she alludes to — "documentation from the claims file, deposition testimony from PSM's claims supervisor, and an affidavit from defense counsel Gildea" — is immaterial to whether the defendant was prejudiced by the delinquency. To the extent that these items are relevant at all, these items relate to question of whether PSM received notice, albeit late. These items do not relate to the whether the insurance company was prejudiced by the tardiness of the notice.[1]

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[1] Even though the plaintiff now contends that she introduced evidence that the insurance company was not prejudiced by the tardiness of the notice, she does not — and cannot — point to any evidence to that effect. To the contrary, the record shows that the plaintiff opposed summary judgment, without producing evidence to show a triable issue of fact. Instead she simply argued that, since the issue of whether the insurance company was prejudiced was a factual issue, she would be "permitted to offer evidence" at trial. App., at 65a.

Actually, the record shows that the delay did prejudice the defense of the case. Because of the delay in notice, the insured selected Paul L. McCullogh, its own counsel, as its defense attorney. (Such a election violated the terms of the insurance policy.) Attorney McCullough then undertook a series of actions that clearly prejudiced the defense of the lawsuit: He filed pleadings for the insured that failed to include relevant defense issues. Instead of trying to negotiate a settlement, he waived an offer of judgment to the insured. He refused to answer discovery, resulting in a default against his client. Instead of trying to open the default, he misled the trial judge about the status of insurance in the case as well as the status of the insured's bankruptcy proceeding. He refused to obey the trial court's direct order to notify the insurance company about the coming trial. He refused to

Because there was no evidence on an issue on which the plaintiff had the burden of proof, the Second Circuit was obligated to sustain the summary judgment.

Because *Celotex v. Catrett* requires entry of summary judgment for the defendant, the Court of Appeals' order, reversing the judgment, should be vacated and the case should be remanded for judgment consistent with Rule 56.

II. THE USE OF ERRATA TO MAKE SUBSTANTIVE CHANGES IN THE JUDGMENT WAS AN ABUSE OF DISCRETION.

The problem with the original opinion below (App. 24a-41a) is obvious: It attempted to decide the appeal without referring to or citing the decisive case, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It totally missed the *Celotex* issue, the decisive issue in the case.

After the slip opinion's omission of the *Celotex* issue, the defendant pointed out the error of this omission in its Petition for Rehearing. The panel attempted to gloss over its blunder by issuing the

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attend the trial, telling the trial judge that he "took no position" as to his client's liability. In fact, he took a very strong position as to his client's liability, testifying against his client as a witness for the plaintiff.

As the district court noted, "Attorney McCullough's representation was, if not a sham, an absolute disaster." App. 55a.

With this record can it possibly be argued that the late notice did not prejudice the insurance company?

Errata Sheet, purporting to correct the omission with "errata," i.e., a list of clerical errors in the panel's slip opinion.

A. Even After The Errata Sheet's "Correction" the Insurance Company Was Still Entitled to Summary Judgment.

The most serious problem with the Errata Sheet is that it does not resolve the *Celotex* error. As noted above, the insurer was entitled to summary judgment because (1) notice to the insurer was late; and (2) because this notice was late, Connecticut law imposes an obligation on the plaintiff to show that the late notice did not prejudice the insurer.

The Errata Sheet did not alter this syllogism. Even with the "correction," notice to the insurance company was still received some 15 months after suit was initiated.[2] Notice was, under either theory, late. Thus, the burden was on the insured, i.e., on the plaintiff, and not on the insurer, to show lack of prejudice. As noted above, the plaintiff submitted no evidence that the insurance company was not prejudiced by the late notice.

Since failure to introduce such evidence mandates summary judgment against the plaintiff, it is immaterial whether the notice was four years late (as

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[2] The Connecticut Supreme Court has held that notice only four months late is a breach of the insurance contract. *City of West Haven v. United States Fidelity & Guar. Co.*, 174 Conn. 392, 397, 389 A.2d 741 (1978). Thus, with or without the "correction" of the Errata Sheet, notice to the insurance company was still late.

the district court held), or some fifteen months late "as held by the Errata Sheet". The point is that the plaintiff did not show that the tardiness did not prejudice the insurance company.[3] Accordingly, even with changes set forth in the Errata Sheet, the defendant was entitled to summary judgment.

B. Using an Errata Sheet to Substantially Alter the Judgment is An Abuse of Discretion.

By characterizing the changes in the opinion as "errata" and summarily changing the opinion without giving the parties notice or an opportunity to be heard, the Second Circuit invoked an informal, summary procedure that should have only be used for clerical errors.[4] Using such errata to substantially revise the

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[3] Indeed, it is clear that the late notice did prejudice the insurance company. See Footnote 1.

[4] This Court has scrupulously limited its use of errata to correct opinions to obvious clerical errors. A review of some fifty United States Supreme Court cases from 1859 through 1988 in which the Court utilized errata corrections show that 41 times it was utilized for typographical errors; three times to add names of counsel to the appearance list; four citation errors; once to add a sentence in the factual background section; and once to clarify the description of the high water mark in a boundary dispute between two states. *Alabama v. Georgia*, 64 U.S. 505, 506 (1859). In none of the cases reviewed did this Court change, add, or modify any substantive law upon which it relied in support of its decision. Moreover, in each case the errata technique was used, the change was clearly identified.

Some 94 court of appeals cases utilizing errata sheets to modify their opinions were identified. In the non-Second Circuit cases, the changes are clearly delineated and essentially correct typographical errors. The exception is the Second Circuit. That Circuit's practice permits an opinion to be summarily altered after

opinion was an abuse of discretion.

While a court of appeals has "inherent judicial power" to identify and correct clerical errors, *Calderon v. Thompson*, 523 U.S. 538, 549, 567 (1998), this Court has ruled that the error-correction power is to be exercised "sparingly." Because of the "profound interests in repose attaching to the mandate of a court of appeals," this power can be exercised only in "extraordinary circumstances" and is subject to review for an abuse of discretion. 523 U.S., at 549, 567.

Accordingly, the Court of Appeals should limit the errata technique to remedy a "clerical error, a copying error or a computational mistake" in its judgment. It should not use an Errata Sheet to make substantive changes in its judgment. See *In re West Texas Marketing Corp. (United States v. Kellogg)*, 12 F.3d 497 (5th Cir. 1994).

C. Using Errata to Materially Change an Opinion Review Contradicts the Appellate Rules.

The plaintiff asserts the petitioner's second

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the period for seeking post-opinion review under Appellate Rule 35 or Rule 40 has expired. See, e.g., *Boria v Keane*, 99 F.3d 492 (2d Cir., May 3, 1996), 90 F.3d 36 (2d Cir., July 17, 1996), 83 F.3d 48 (2d Cir., May 3, 1996) (where the Second Circuit substituted a 'corrected opinion' long after the period to seek review had expired). Another example is *In re McKenna*, 238 F.3d 186 (2d Cir. 2001) (decided January 17, 2001, modified by an Errata Sheet, on April 16, 2001). (A subsequent report of the *McKenna* case, reported at 2001 WL 4577775, asserts that the errata sheet was followed by yet another modification on May 1, 2001.)

argument lacks "legal authority." Opposition Brief, at 12. The plaintiff is wrong, dead wrong. The legal basis for the defendant's argument is found in Rules 35 and 40 of the Federal Rules of Appellate Procedure.

The Federal Rules of Appellate Procedure provide the procedure for cases in the Courts of Appeals. These procedural rules are not mere guidelines; they are objective rules of law that regulate the conduct of federal judicial proceedings.

> When a situation is covered by the Federal Rules, ... the court has been instructed to apply the Federal Rule, and can refuse to do so only if ... the Rule ... transgresses ... the Enabling Act or constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471 (1965).

The Appellate Rules grant the losing party in the Court of Appeals the right to respond to the panel opinion in two ways: (1) the party can seek review under Appellate Rule 40 from the original panel; or (2) en banc review under Appellate Rule 35.

The panel's decision to bypass the procedures set forth in Appellate Rules 35 and 40 by issuing an Errata Sheet after the Petition to Rehear had been filed, had the effect of cutting off the defendant's rights under the Appellate Rules. Because the Rules grant a right to seek further review either before the original panel or en banc, the decision to cut off that right by using the Errata Sheet, not as a way to correct clerical errors, but as a judicial shortcut to bypass the normal

procedures of the Appellate Rules, should not be permitted.[5]

D. The Opinion Resulting from the Errata Sheet Will Result in Error and Confusion on Remand.

The result of this procedural morass will be confusion and controversy on the remand. For example, *Celotex v. Catrett* is quite clear that, in federal summary judgment motions, the burden of showing the existence of a genuine issue of material fact is on the party having burden of proof at trial. Despite this holding the original slip opinion held that "Public Service bore the burden of 'demonstrat[ing] the absence of any genuine factual dispute.'" App. 36a. while even though the law is quite clear that the burden is on the plaintiff, not the defendant, the slip opinion stated the issue on remand as "whether Public Service may on remand show prejudice." App. 40a. The ultimate decision did not correct these obvious errors as to who will have the burden on remand.

Instead of resolving confusion, the ultimate opinion merely garbled the issue of who has the burden on remand. Even though the *Celotex* case holds that the burden in a federal summary judgment motion is on the party with the burden of proof at trial, not on the

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[5] This Court has authority to "prescribe the method by which the lower courts go about deciding the cases before them." *Nguyen v. United States*, 123 S.Ct. 2130, 2138 n.13 (2003) ("The authority to review judgments of the courts of appeals undoubtedly vests us ... with authority to prescribe the method by which those courts go about deciding the cases before them.").

moving party, the ultimate opinion referred to the defendant's burden "as the moving party, . . . to demonstrate the absence of a genuine issue of material fact on the material prejudice issue." App. 17a. The court then confused the issue further by stating that it "express[ed] no opinion" on that issue. App. 17a.

In short, the Second Circuit's effort to create a shortcut by ignoring the procedural mandates of the Appellate Rules has resulted in a confused and misleading opinion. Instead of applying this Court's often stated *Celotex* rule, the opinion below rejects the principles of *Celotex*.

CONCLUSION

Either *Celotex Corp. v. Catrett* is the law or it is not. Although this Court has repeatedly reaffirmed and reiterated the holding of *Celotex*, the Second Circuit now refuses to apply that well known rule. Because the Second Circuit's ruling deviated from well-established precedent, the petitioner again prays that this court grant the writ of certiorari, vacate the decision below and remand for further proceedings consistent with *Celotex Corp. v. Catrett* (1986).

Respectfully submitted,

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